

Geoffrey W. Castello (GC 1509)
Lauri A. Mazzuchetti (LM 8035)
KELLEY DRYE & WARREN LLP
200 Kimball Drive
Parsippany, New Jersey 07054
(973) 503-5900
Attorneys for Defendant
Synapse Group, Inc

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

CHARLES T. MCNAIR,)
THEODORE AUSTIN;)
DANIELLE DEMETRIOU;)
USHMA DESAI; and)
JULIE DYNKO,)
on behalf of themselves and all)
others similarly situated,)
)
Plaintiffs,) Civ. Action No. 06-cv-5072 (JLL)(CCC)
v.)
)
SYNAPSE GROUP, INC.,)
)
Defendant.)
)

CERTIFICATION OF THOMAS E. GILBERTSEN

THOMAS E. GILBERTSEN duly sworn hereby certifies as follows:

1. I am a partner in the Washington, D.C. office of Kelley Drye & Warren LLP, and am admitted *pro hac vice* to this Court to represent Synapse Group, Inc. ("Synapse") in the above-captioned lawsuit. I make this declaration in support of Synapse's Memorandum of Law in Opposition to Plaintiffs' Motion for Class Certification, filed herewith.

2. Attached hereto as Exhibit "A" is a true and accurate file-stamped copy of a June 15, 2006 order denying class certification in *Fingal v. MDSC Corp.*, No. 22032-00742 (Mo. Cir. Ct.).

3. Attached hereto as Exhibit "B" is a true and accurate copy of cited excerpts from the transcript of the deposition upon oral examination of Plaintiff Theodore Austin taken by Synapse on December 11, 2007.

4. Attached hereto as Exhibit "C" is a true and accurate copy of a document produced by plaintiffs and bearing production numbers MCNAIR 000043-45, representing Plaintiff Theodore Austin's bank statements reflecting magazine renewal charges of July 16, 2007.

5. Attached hereto as Exhibit "D" is a true and accurate copy of cited excerpts from the transcript of the deposition upon oral examination of Plaintiff Charles McNair, taken by Synapse on November 5, 2007.

6. Attached hereto as Exhibit "E" is a true and accurate copy of cited excerpts from the transcript of the deposition upon oral examination of Plaintiff Danielle Demetriou, taken by Synapse on November 12, 2007.

7. Attached hereto as Exhibit "F" is a true and accurate copy of cited excerpts from the transcript of the deposition upon oral examination of Plaintiff Ushma Desai, taken by Synapse on November 26, 2007.

8. Attached hereto as Exhibit "G" is a true and accurate copy of cited excerpts from the transcript of the deposition upon oral examination of Plaintiff Julie Dynko taken by Synapse on April 5, 2008.

9. I reviewed the full transcript of the deposition upon oral examination of Plaintiff Julie Dynko and counted 117 instances in which Dynko testified that she did not recall events sufficient to answer the questions posed.

10. Attached hereto as Exhibit "H" is a true and accurate copy of documents produced by plaintiffs and bearing production numbers MCNAIR 000039-41, representing printed pages of plaintiffs' counsel's "CONSUMER INVESTIGATION WEBSITE," dated August 29, 2006.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Dated: Sept. 3, 2008



A handwritten signature in black ink, appearing to read "Thomas E. Gilbertsen". The signature is fluid and cursive, with a long, sweeping line for the last name.

Thomas E. Gilbertsen

Gilbertsen Exhibit A

STATE OF MISSOURI)
)
CITY OF ST. LOUIS)

FILED

JUN 15 2006

MARIANO V. FAVAZZA
CLERK, CIRCUIT COURT
BY _____ DEPUTY

CHRISTI M. FINGAL,)
)
Plaintiff,)
) Cause No. 220~~3~~2-00742
v.)
) Division No. 1
MDSC CORPORATION,)
)
Defendant.)

ORDER

This matter comes before the Court on (1) Plaintiff's motion for class certification and (2) Defendant's motion to preclude certain evidence offered by Plaintiff in support of her motion for certification. The latter motion is denied. As to class certification, the Court now rules as follows.

I. BACKGROUND

The parties' familiarity with the factual and procedural background of this matter is presumed; and accordingly the Court will summarize it only briefly for purposes of this order.

Plaintiff Christi M. Fingal (Plaintiff) has brought the present action against Defendant MDSC Corporation (Defendant or MDSC) alleging that she was offered a free "trial subscription" to several magazines from MSDC or its affiliates in conjunction with her telephone order for catalog merchandise from Spiegel

Inc.¹ She alleges that Defendant, a large seller of magazine subscriptions, sold many such subscriptions by means of "free trial offers" which were made to the customer over the phone by telemarketers for catalog merchandise, wherein the telemarketer would typically tell the consumer under the terms of the offer that the consumer would be able to cancel the subscription within a certain amount of time during the free "trial" period if dissatisfied with the magazines for any reason, etc. Plaintiff alleges that these telephone offers for trial magazine subscriptions were typically made (both in her individual case and generally speaking) by catalogue merchandise telemarketers pursuant to contractual agreements with Defendant, in which the telemarketer, when pitching such an offer to the consumer on behalf of MDSC, was contractually required to read, substantially follow, and not deviate from an agreed-upon script.

In her particular case, Plaintiff alleges that she was told a number of misleading things when the offer for a free trial magazine subscription was made over the phone, and also that the catalog merchandise company's telemarketer with whom she spoke never informed her that it would provide Defendant MSDC with her credit card account information, such that MDSC could and would charge her credit card account for a full one-year subscription to each of the three magazines that she selected if she did not

¹ Spiegel Inc. is no longer a named Defendant in this action.

cancel the subscription before the expiration of the free trial period.

Plaintiff further alleges that as a general practice the Defendant, once a customer agrees to such a "free trial" offer, often essentially ignores a customer's attempts to cancel the magazine subscription (either before the expiration of the free trial period or afterwards), and/or that Defendant engages in a variety of practices designed to make it "unreasonably difficult" for the consumer to cancel the magazine subscription.

In her own particular case, Plaintiff alleges that after she accepted the free "trial offer" she began receiving the three magazines she chose, and within two months or so received a separate bill for each one of them. But, she claims, when she wrote "cancel" across each of these bills and promptly returned them in the mail---which, she alleges in her first amended petition², the Spiegel sales representative had told her was all she would need to do if she wished to cancel and not be billed for the magazines---these attempts to cancel were ignored by Defendant. Instead, Plaintiff says in her pleading, she was sent numerous post cards with a "1-800" number which indicated she would need to call that number to cancel the subscriptions. But,

² The record shows that Plaintiff's first amended petition, although not styled as such (it is titled "Class Action Petition") was filed on or about January 31, 2005. It was filed partly in response to the Court's earlier order dismissing two of Plaintiff's three counts, and partly due to some of the earlier-named defendants being dropped as party defendants.

Plaintiff alleges, calling the number listed on the cards only resulted in her being sent through "seemingly endless layers of phone menus, making it extremely difficult for a caller to actually speak with a live person" about the magazine subscription. Indeed, she alleges, she never succeeded in being able to speak with a live person.³

Thus, Plaintiff claims, even though some of the magazines began to stop coming even before the first year subscription period had run out, she nevertheless was billed in full for this "first wave" of the three magazines that she had ordered pursuant to the trial offer and had then tried to cancel. Specifically, she says, in August of 2001 her Visa card was charged \$57 for the first magazine she had chosen, \$50 for the second magazine, and \$22 for the third. Then, she alleges, in May and June of 2002, her card was again charged the same amounts, for renewed subscriptions to the same magazines, after which magazines started coming to her again.

Finally, Plaintiff alleges as regards her own individual experience, none of the above charges was ever "authorized" by her in any meaningful sense, but instead they were completely unauthorized and contrary to her expressed intent to cancel the magazine subscriptions.

³ Plaintiff does not indicate in her petition the number of times she called this number in an attempt to speak to someone, or if she tried more than once to do so.

Plaintiff seeks to bring her cause of action as a class action, on behalf of herself and "all persons nationwide who are similarly situated." Plaintiff alleges broadly that the above-mentioned conduct and marketing methods of Defendant violate the Missouri Merchandising Practices Act (MMPA, or Act), § 407.020 RSMo., et seq., and constitute an "unlawful practice" as defined in the Act. She alleges that she and members of the putative class have suffered damages as a result of such conduct. The MMPA provides, in crucial part:

The act, use, or employment by any person of any deception, fraud, false pretense, false promise, misrepresentation, unfair practice or concealment, suppression or omission of any material fact in connection with the sale or advertisement of any merchandise in trade or commerce . . . is hereby declared to be unlawful.

Section 407.020 RSMo. The Act further provides for a private cause of action to recover actual and punitive damages; and it specifically authorizes claims under the MMPA to be brought as class actions, in appropriate cases, "if the unlawful method, act or practice has caused similar injury to numerous other persons."

Section 407.025 RSMo.

II. PROPOSED CLASS DEFINITION

As a preliminary matter, the Court will first note the somewhat odd fact that, apparently, Plaintiff has never filed a formal, written class action certification "motion" as such in this case. Defendant has noted at least twice in its briefs that

it has never been served with such a motion; and a review of the actual court file appears to indicate that no such motion was ever filed.⁴ The Court does not see this apparent omission as any particular problem, but rather simply wishes to carefully note for the record that there appears to be no specific written "motion" for class certification that the Court can refer to, for guidance, in seeking to clarify any ambiguities or uncertainties that may exist regarding the precise parameters of the proposed class and the definition of the class.⁵

In that regard the Court will also note that, in the class action papers which Plaintiff has filed, she appears to be offering two different proposed class definitions, which differ from each other to a significant degree. The broader of the two proposed class definitions is found in the Plaintiff's Class

⁴ The electronic docket sheet minute entries do appear to suggest that a "motion for class certification" was filed on or about August 11, 2005--some 10 months after Plaintiff filed her first legal memorandum in support of class certification. However, no such document appears in the actual Court file itself. The Court file instead suggests that the 8-11-05 minute entry actually refers to a document filed on that date by Plaintiff entitled "Memorandum To Clerk," in which Plaintiff merely advised the Court that she was passing the hearing on the issue of class certification, which at that time was scheduled for August 17, 2005, "to a time mutually acceptable to the parties and the Court."

⁵ The Court is not aware of any rigid rule which absolutely requires that a written motion must always be filed before the Court may take up the issue of whether a cause styled as a class action may properly be certified as such, or that such a motion cannot be oral. To the extent that such a rule might otherwise exist, the Court believes it can be waived where, as here, the party opposing class action status has not objected on that basis, and where the parties instead have fully briefed the issue and proceeded with the matter just as if a formal "motion" seeking class certification had been filed.

Action Petition, in which she seeks to define the putative class as consisting of:

all persons nationwide who have had unauthorized charges charged to their credit cards, debit cards, checking accounts, or other accounts for any amount by MDSC regardless of whether said charges were accompanied by unsolicited magazines.⁶

In contrast, in her later-filed "Amended Memorandum in Support of Class Certification," which was filed on or about May 31, 2005, Plaintiff proposes the following class definition, which is different from---and narrower than---the one above. The new definition differs in that it adds the below-underlined language; and the added words tend to both (a) attach some time constraints to the class definition which did not exist before, and (b) (at least to some extent), limit the scope of what could be meant by the phrase "unauthorized" charges⁷. This revised proposed class definition is:

All persons nationwide who have had unauthorized charges charged to their credit cards, debit cards, checking accounts, or other accounts for any amount by MDSC after canceling a trial subscription, from 1998 through the present.

⁶ See Class Action Petition, paragraph 44. The proposed class definition in Plaintiff's petition also contains standard boilerplate language (which the Court has not repeated, above) noting that Defendant or its affiliated parties, as well as the Court and its personnel, are excluded from the class.

⁷ The revised proposed class definition also differs from the earlier one in that it omits the closing words "regardless of whether said charges were accompanied by unsolicited magazines." The omitted language is probably unnecessary, as the MMPA provides that a person receiving unsolicited merchandise may either refuse to accept delivery of the merchandise, or may deem it to be a gift and use it or dispose of it in any manner without obligation to the sender. See § 407.200 RSMo.

The Court will assume that the later, narrower proposed class definition is the one that Plaintiff is seeking to have the Court certify⁸. The Court notes that, although Defendant complained at the hearing on class certification that this later proposed definition amounted to something of a "moving target" for Defendant relative to the earlier one, the later definition is in fact more consistent with the arguments and overall theory of the case propounded in Plaintiff's briefs. Those arguments lay very heavy emphasis on the so-called "back end" of the transaction---(that is, Defendant's alleged practice of ignoring customers' attempts to cancel the trial subscriptions and/or making such cancellation efforts unreasonably difficult)---as constituting the real crux of this case, and as being the core determinant of whether billing charges for the magazine subscriptions should be deemed "unauthorized."

III. Class Action Standard

Rule 52.08(a)(1)-(4) and § 407.025.3(1)-(4) RSMo set out the prerequisites for a class action MMPA claim; they require, at a minimum, "that (1) the class be so numerous that joinder of all members is impracticable, (2) questions of law or fact common to

⁸ The Court, if requested to do so, would reject the earlier, broader proposed definition as being far too vague and amorphous. The phrase "unauthorized charges" could mean a very wide variety of things in a variety of different contexts as applied to magazine subscriptions---whereas addition of the key qualifying phrase "after canceling a trial subscription" (which if generously construed would presumably include reasonable attempts to cancel) at least arguably gives "unauthorized charges" a more reasonably narrow focus and specific meaning.

the class exist, (3) the claims of the representative parties are typical of the claims of the class, and (4) the representative parties will fairly and adequately protect the interests of the class." Craft v. Philip Morris Companies, Inc., No. ED 85142, 2005 Mo. App. LEXIS 1213, at *16-*17 (Mo. App. E.D., decided August 16, 2005)⁹ (quoting State ex rel. American Family Ins. v. Clark, 106 S.W.3d 483, 486 (Mo. banc 2003)). These requirements are mandatory, and certification is appropriate only if each listed element is met. Id.

In addition to the requirements of Rule 52.08(a), a class must also satisfy one of the three requirements of Rule 52.08(b). Craft, 2005 Mo. App. LEXIS 1213, at *17; Clark, 106 S.W.3d at 487. Plaintiff has alleged facts indicating that she seeks certification under Rule 52.08(b)(3).¹⁰ That rule allows a lawsuit

⁹ The Missouri Court of Appeals' opinion in Craft is not final until full expiration of the applicable rehearing period. However, the Court of Appeals did deny the motion for rehearing/transfer in that case; and the case was apparently then removed to federal court for some period of time thereafter. Although the current status of Craft is still not entirely clear to this Court, it nonetheless appears that the Missouri Supreme Court has now denied a motion by the appellants seeking transfer of the cause to that court. (See entry in official minutes of Missouri Supreme Court dated May 30, 2006.) If so, then even though the Court of Appeals' opinion in Craft has not yet appeared in the official Southwestern 3rd Reporter, it would appear that Craft is now final, and thus may properly be cited and relied on as precedential authority in Missouri.

¹⁰ As a fallback position, Plaintiff also makes a fleeting argument in her briefs that certification in her case would be appropriate as well under Rule 52.08(b)(1)((A)). That rule permits class actions where prosecution of separate actions by individuals would present a risk of "inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class." The Court disagrees. Individual damages actions will of course always result (to some degree) in "varying adjudications;" but that fact alone does not show that such actions would establish "incompatible" standards of conduct. See Green v. Occidental Petroleum Corp., 541 F.2d 1335, 1340 (9th Cir. 1976).

to proceed as a class action if the court finds that common questions of law or fact "predominate over any questions affecting only individual members" and that "a class action is superior to other available methods for the fair and efficient administration of the controversy."

The burden of proof, to show that all of the necessary requirements are met, is on the party seeking class certification. Craft, 2005 Mo. App. LEXIS 1213, at *17 (citing Coleman v. Watt, 40 F.3d 255, 258 (8th Cir. 1994)). See also Grossner v. Kandel-Iken Builders, Inc., 647 S.W.2d 911, 917-918 (Mo. App. E.D. 1983).

Because Missouri Rule 52.08 and Federal Rule of Civil Procedure 23 are identical, Missouri courts may consider federal decisions interpreting Rule 23 in interpreting Rule 52.08. Craft, 2005 Mo. App. LEXIS 1213, at *10. See also Union Planters Bank, N.A. v. Kendrick, 142 S.W.3d 729, 735 n.5 (Mo. banc 2004); Koehr v. Emmons, 55 S.W.3d 859, 864 n.7 (Mo. App. E.D. 2001).

IV. DISCUSSION

Because all required elements must be shown in order for class certification to be appropriate, if the Court determines that one or more specific required factors are lacking, then it need not extensively consider (or even consider at all) other required factors. See Saey v. CompUSA, Inc., 174 F.R.D. 448, 451 (Mo. App. E.D. 1997). Accordingly, because this Court, as

discussed more fully hereinafter, has determined that certain other elements are lacking, the Court will simply assume, without deciding, that Plaintiffs have shown the element of numerosity, as well as that there exist at least one or more common questions of law or fact.¹¹ Instead, the Court's discussion will focus on two areas of difficulty which the Court believes preclude class certification in this instance.

(1) No Nationwide Class

The first and by far the most glaring difficulty with Plaintiff's proposed class is that, for a variety of related reasons, a nationwide class simply is not proper in this case.

Regardless of whether the problems associated with nationwide classes are deemed to be an aspect of the "commonality" requirement or of the "predominance" requirement, the Missouri Supreme Court has made clear that such classes are not favored if they would require a trial court to contend with widespread variations in applicable state laws.

In In State ex rel. American Family Ins. v. Clark, 106 S.W.3d 483, 486-487 (Mo. banc 2003), the court held that, even with

¹¹ The Court nonetheless briefly notes that, as a general matter, even as to these elements, Plaintiff has made a remarkably weak evidentiary showing. As Defendant notes, Plaintiff has offered virtually no formal evidence at all; and the supporting affidavit of a paralegal who works for Plaintiff's counsel's law firm, discussing the purported contents of a website (www.ripoffreport.com) on the Internet, would certainly be inadmissible hearsay at trial. Even so, the Court may perhaps be free to consider the affidavit---and, indeed, the Court has considered it, for what it may be worth---in the context of this class certification proceeding. However, the burden of proving the class action prerequisites still rests with the party seeking certification. Allegations alone are not enough, nor is mere conjecture.

differences in as few as fourteen states, multi-state classes should not be allowed in Missouri when there are significant differences in the state laws that would have to be applied to the class members in the various other states outside of Missouri.¹²

Although Clark articulated what amounts in substance to a fairly strong presumption against multi-state classes if the claim involves significant variations in the applicable state laws, that is precisely the type of class that Plaintiff here has proposed. Her only stated claim in the amended petition is under the Missouri Merchandising Practices Act. On its face the MMPA **only** applies to alleged conduct that emanates from or occurs in the State of Missouri (see 407.020.1 RSMo); and by the same token Missouri does not have the power to regulate purely out-of-state transactions affecting only non-Missouri residents. Thus, unless Plaintiff and her counsel can find some way to circumvent these inconvenient legal realities, a nationwide class is plainly precluded.

In an effort to achieve just such circumvention, Plaintiff argues that predominance of common questions can still be found if the overriding issue is deemed to be whether the alleged

¹² As Judge Wolff noted in his separate concurring opinion in Clark, allowing such multi-state classes can also, depending on the nature of the class claims and the type of notice that out-of-state class members do or don't receive, implicate very serious jurisdictional concerns as well. See Clark, 106 S.W.3d at 493-495.

conduct of Defendant "violates the Missouri Merchandising Practices Act (and similar statutes of the other 49 states and the District of Columbia)."¹³ (emphasis added) In this regard, Plaintiff argues that there is "significant similarity" among the various state laws concerning unfair and deceptive trade practices, and that any salient differences between them amount to merely "minor variations in the verbiage used."¹⁴

This Court disagrees. While it is true that there is a substantial degree of overlap in the various state consumer protection statutes, it is true as well--and this Court knows from its own independent research in previous cases with which it has dealt--that there are also numerous and **significant** variances among many of these statutes, which amount to far more than mere "minor" differences. (See also the in-depth discussion in Lyon v. Caterpillar, Inc., 194 F.R.D. 206, 218-222 (E.D. Pa. 2000), wherein class certification was denied on this very ground.)

In order for class certification of a multi-state class to be appropriate in cases involving significant differences among many various applicable state laws, a movant must "credibly demonstrate, though an extensive analysis of state law variances, that class certification does not present insuperable obstacles."

Adams v. Kansas City Life Insurance Co., 192 F.R.D. 274, 277

¹³ "Plaintiff's Amended Memorandum in Support of Class Certification," at 14.

¹⁴ "Plaintiff's Amended Memorandum in Support of Class Certification, at 22-23.

(W.D. Mo. 2000). See also Chin v. Chrysler Corp., 182 F.R.D. 448, 453 (D. N.J. 1998) (holding same).

Here, Plaintiff has made a good faith (albeit somewhat belated) attempt to provide such an "extensive analysis," in an effort to meet her burden of demonstrating that the consumer protection statutes of the 50 states and the District of Columbia under which she seeks class certification would "not present insuperable obstacles" to the implementation of the case as a class action. Such effort was provided in the form of a 10-page spreadsheet offered to the Court and opposing counsel on the day of the class certification hearing, amounting to a rather simplistic survey of the various state statutes. This survey focused on quoting the purported key "operative text" of each statute, on whether or not the respective state statute prohibited class actions¹⁵, and on what kind of damages/costs each statute allowed.

The Court finds, however, that the survey which Plaintiff offered is not an extensive analysis¹⁶, and comes nowhere near to

¹⁵ According to the survey, at least six states flatly prohibit class actions under their respective consumer protection statutes---so presumably residents of those particular states could not be members of the proposed class in any event.

¹⁶ Plaintiff's spreadsheet did not, for example, analyze variances among the state laws as to their intent/reliance requirements (if any), or what conduct is or is not deemed actionable, or their respective statutes of limitations; nor did it uniformly analyze whether a private right of action is allowed under the state's statute. Nor has Plaintiff suggested a more narrowed and tailored nationwide class that at least in theory perhaps might take into account some of these factors; cf. Saey v. CompUSA, 174 F.R.D. at 449.

convincingly demonstrating that litigation of this matter as a class action would not present insuperable obstacles stemming from the variances in the 50+ different state laws. Instead, the Court finds the memorandum which Defendant filed in reply to Plaintiff's state law survey to be both a substantially more in-depth legal analysis, as well as more persuasive, on this issue. Likewise, the Court is persuaded by the careful reasoning and analysis set forth in Lyon v. Caterpillar, Inc., *supra*, 194 F.R.D. at 218-222.

The Court thus finds that because of the existence of the state law variances that would have to be dealt with by the Court if the proposed class were certified, common questions of law would not predominate over individual questions of law.

Notwithstanding the above finding, the Court believes it may also need to examine the conceptually separate issue of whether common questions of **fact** in this case may nevertheless "predominate" over the more individualized questions of law and fact. As to a possible nationwide class, there is some authority for the proposition that even the existence of marked state law variations is, standing alone, not always sufficient to preclude certification.

It is true that a number of courts, even some that have been most skeptical of using the fifty (50) different state consumer protection statutes as a basis for certifying a proposed

nationwide class, have nonetheless opined that the "mere existence of state law variations is not alone sufficient to preclude class certification," and indeed that such actions may sometimes be maintained "even when state law variations are marked."¹⁷ Lyon v. Caterpillar, Inc., 194 F.R.D. 206, 221 (E.D. Pa. 2000).

Those same courts, however, have also and at the same time held that in such cases common issues of fact, in order to overcome and "predominate" over divergent legal issues, must truly cut a wide swath and supersede the latter. For the plaintiff must demonstrate not just that there may be some common questions, but "that individual factual inquiries do not predominate when all the relevant consumer fraud statutes are applied." Lyon, 194 F.R.D. at 221. "When state law variations are significant," courts will approve class certification only where "the evidence in each case on major factual questions was either identical or virtually so." Id.

For reasons explained more fully below, the Court concludes the Plaintiff here does not meet that strict standard, especially inasmuch as the Court believes it would likely require a mini-trial in the case of each individual putative class member just

¹⁷ The Court is uncertain whether that proposition is good law in Missouri given the pronouncements of our Supreme Court concerning multi-state classes and state law variances in Clark, supra, but recognizes that this question perhaps is one that remains somewhat unsettled and open to interpretation.

to determine if the person was, in fact, actually even a member of the class at all. Thus, this Court, like the court in Lyon, finds that the combination of some divergent factual issues, coupled with a mass of divergent legal issues stemming from the many state law variances, means that Plaintiff has failed to demonstrate overall "predominance" of common issues of law and/or fact with respect to the proposed nationwide class.

The Court further notes that even if Plaintiff had proposed the same class as herein except that the class was limited solely to Missouri residents (i.e., a statewide class rather than a nationwide class), there would still be at least some significant doubt as to whether, in the final analysis, common questions of law and fact truly "predominated" over individual questions in this case. That is in part because, given the nature of Plaintiff's claim and allegations that she tried to cancel the trial subscription but that Defendant largely ignored her efforts to do so, and/or that Defendant made the phone cancellation process overly difficult, it can perhaps be plausibly argued that this case---much like that in another proposed class action brought under the MMPA where class certification was denied---would require extensive individual mini-trials for every putative class member just to even reliably determine "whether he or she

falls within the class definition." Saey v. CompUSA, 174 F.R.D. at 451.¹⁸

However, the Court need not decide whether a statewide class could properly be certified in this matter, because Plaintiff has not proposed such a class in any of her class action papers. It is not the Court's role to rule upon classes other than those a plaintiff has formally proposed and sought approval for.

(2) Lack of Typicality/Adequacy of Representation

The Court further finds that in at least one crucial respect Plaintiff's individual claim is not "typical" of the claims of most class members, because the record in this case shows that a very serious doubt exists as to whether she purchased the magazines in question primarily for personal or family use. As a

¹⁸ It must be remembered that class action treatment is still very much the exception, not the norm, even in many situations that might possibly involve consumer fraud. The class action is an "exception to the usual rule that litigation is conducted by and on behalf of individual named parties only." General Telephone Company Southwest v. Falcon, 457 U.S. 147, 155, 102 S. Ct. 2364 (1982). Thus, not all instances of an allegedly widespread pattern or practice of consumer fraud---even when they do meet the four basic requirements of numerosity, commonality, typicality and adequacy of representation---necessarily meet the predominance requirement. In that regard, the Court notes that in this case, unlike some cases of alleged unfair or deceptive trade practices where there may be clear proof in each individual instance as to whether or not a putative class member was in fact directly and adversely impacted by the challenged practice (i.e., whether or not the person is in fact even a class member at all), the proof as to class membership here likely would not be nearly so uniform and verifiable. Instead, such proof would appear to necessarily involve a highly **individualized** inquiry in each case as to what efforts the person allegedly made to cancel his or her magazine subscriptions; how many times he or she attempted (whether by phone or otherwise) to reach the company in an effort to cancel; what happened on each of those occasions; whether the efforts to cancel were made before or after the "free trial" period expired; etc.; etc. The requirement of Rule 52.08(b) that common questions must truly "predominate" over any individualized issues is a more stringent test than the commonality requirement of Rule 52.08(a). See Amchen Products, Inc. v. Windsor, 521 U.S. 591, 609, 117 S. Ct. 2231 (1997).

result of this cloud over her individual claim, the Court finds Plaintiff also has not shown that she would adequately represent the interests of the class.

Typicality, in certain respects, is closely related to the ability of a plaintiff to be an adequate representative of class members. See Amchen Products, Inc. v. Windsor, 521 U.S. 591, 620 (1997). The underlying premise of the typicality requirement "is simply stated: as goes the claim of the named plaintiff, so goes the claim of the class." Sprague v. General Motors Corp., 133 F.3d 388, 399 (6th Cir. 1998). Typicality is negated when the named plaintiff's claims are unlike those of the absent class members, and/or if there exists a substantial defense unique to the named plaintiff. Id.; see also Hanon v. Dataproducts Corp., 976 F.2d 497, 508 (9th Cir. 1992).

To satisfy the adequacy requirement, a plaintiff must establish that his interests are coextensive with the putative class, that he has no conflict of interest with the class, and that he will fairly and adequately represent the interests of the putative class; he must also show that his counsel is competent to handle a class action. Lingquist v. Bowen, 633 F. Supp. 846, 859 (W.D. Mo. 1986). A plaintiff must allege **and prove** facts showing that the plaintiff would adequately represent the class. Craft, 2005 Mo. App. LEXIS 1213, at *19 (citing Kansas City Terminal Ry. Co. v. Industrial Commission, 396 S.W.2d 678, 680

(Mo. 1965)). Adequate representation "is a fact issue that must be determined under the circumstances of each case."¹⁹ Id. (citing City of O'Fallon v. Bethman, 569 S.W.2d 295, 299 (Mo. App. 1978)).

When evaluating adequacy of representation, the trial court must determine if the named plaintiff representative has any conflicts of interest which would adversely affect the interests of the class. Id. (citing Union Planters, 142 S.W.3d at 735). This requirement "is particularly important because the due process rights of absent class members may be implicated if they are bound by a final judgment in a suit where they were inadequately represented by the named plaintiff." Id.

It has often been held that representation cannot be adequate, and hence that class certification is not appropriate, "where a putative class representative is subject to unique defenses which threaten to become the focus of the litigation." Gary Plastic Packaging Corp. v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 903 F.2d 176, 180 (2nd Cir. 1990); see also Hanon v. Dataproducts, *supra*, 976 F.2d at 508.

¹⁹ In this regard the Court further notes that, although in determining the propriety of a class action the court generally should avoid any "preliminary inquiry into the merits" of the action (since the issue is not whether the plaintiff likely will prevail on the merits but rather whether the requirements of a class action have been met), nevertheless, it is proper for the court to look at the factual setting of the case and consider the merits to the extent that the merits are intertwined with the issue of whether the class action prerequisites have been met. See Craft, 2005 Mo. App. LEXIS 1213, at *12-14.

Here, the Plaintiff is subject to a "unique defense," which would inevitably become a major focus of the litigation in her own particular case. It is undisputed that Plaintiff ordered the magazines in question from her law office, and that they were sent to her law office, not her personal residence. Thus, the record shows there is some real doubt, and a genuine question of fact exists, as to whether Plaintiff ordered the merchandise "primarily for personal, family or household purposes" as the statute requires (see § 407.025), or whether instead she ordered them mainly for business use.²⁰ Therefore, although this issue is, as the Court has previously ruled due to the standard which governs motions to dismiss for failure to state a claim, not an issue on which the Defendant can properly seek to have Plaintiff's MMPA claim dismissed²¹, it nonetheless is an issue which Defendant clearly can raise and assert as a potentially

²⁰ Contrary to what Plaintiff argues on pages 2-4 of her "Consolidated Reply Memorandum in Support of Class Certification," this issue was not somehow "fully and finally resolved" merely because Plaintiff testified in her deposition that she usually took the magazines home to read, that she wasn't sure whether they were ever set out in her office for her clients to read, or because she testified--with poor supporting documentation--that she did not deduct the cost of the magazines from her taxes as a business expense. Simply put, the jury would not be required to automatically believe Plaintiff's testimony on this point. On the contrary, the fact that Plaintiff had the magazines mailed to her business address rather than to her home is alone sufficient to support an inference that they were primarily intended for business use; and given the overall record here a reasonable trier of fact would be free to find either that the magazines at issue were purchased primarily for personal use, or that they were not.

²¹ See page 3 of the Court's order in this cause entered on October 29, 2003, the Hon. Michael P. David.

viable defense against Plaintiff---and on which, quite possibly, the Defendant might ultimately prevail.

Moreover, this is a defense which in a real sense would be "unique" to the Plaintiff compared to other class members, since obviously the vast majority of persons who purchase general circulation magazines do so for personal or family/household use rather than for business use. Still further, it is all the more a concern because this issue, properly speaking, is not even an "affirmative defense"---something which a defendant normally has the burden of establishing. Rather, the requirement that a plaintiff must have ordered the merchandise "primarily for personal, family or household purposes" is a **necessary element** of the plaintiff's cause of action, and something which she therefore has the burden of proving²². Without establishing this element, Plaintiff simply has no cause of action under the MMPA at all.

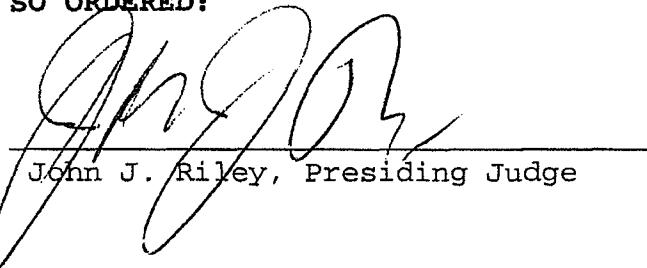
Given these considerations, the Court is not persuaded that Plaintiff's claim would be typical of the putative class, or that she could adequately represent the interests of the class when her own claim is so freighted with a unique and potentially viable defense.

²² This is so because the requirement that the merchandise must have been purchased "primarily for personal, family or household purposes" is an express requirement of the part of the Act which creates a private cause of action under the MMPA. (See § 407.025.1 RSMo.) It therefore is a necessary element of such a private claim, though actions brought by the Attorney General under the Act are not subject to the same limitation.

V. CONCLUSION

WHEREFORE, for the foregoing reasons, it is hereby ordered that Plaintiff's motion for class certification is **denied**. It is further ordered that "Defendant's Motion to Preclude Certain Evidence Submitted in Support of Plaintiff's Motion for Class Certification" is **denied as moot**.

SO ORDERED:



John J. Riley, Presiding Judge

Dated: June 15, 2006

cc: James J. Rosemerry, Attorney for Plaintiff
CAREY & DANIS, LLC
8235 Forsyth Blvd., Suite 1100
St. Louis, MO 63105

Jason E. Maschmann, Attorney for Defendant
BRYAN CAVE LLP
211 N. Broadway, Suite 3600
One Metropolitan Square
St. Louis, MO 63102

Gilbertsen Exhibit B

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December 11, 2007

1

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW JERSEY

----- X

CHARLES T. MCNAIR, on behalf :
of himself and all others :
similarly situated, :
Plaintiffs, : Civil Action No:
v. : 2:06-CV-05072
SYNAPSE GROUP, INC., : (JLL) (CCC)
Defendants. :
----- X

Washington, D.C.

Tuesday, December 11, 2007

Deposition of THEODORE AUSTIN, a Plaintiff herein, called for examination by counsel for Defendants in the above-entitled matter, pursuant to notice, the witness being duly sworn by SUSAN L. CIMINELLI, CRR, RPR, a Notary Public in and for the District of Columbia, taken at the offices of Kelley Drye & Warren, LLP, 3050 K Street, N.W., Washington, D.C., at 10:05 a.m.

 ORIGINAL

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1 P R O C E E D I N G S

2 Whereupon,

3 THEODORE AUSTIN,

4 was called as a witness by counsel for Defendant, and
5 having been duly sworn by the Notary Public, was
6 examined and testified as follows:

7 EXAMINATION BY COUNSEL FOR DEFENDANT

8 BY MR. GILBERTSEN:

9 Q. Good morning, Mr. Austin.

10 A. **Good morning.**

11 Q. Could you please state your name for the
12 record?

13 A. **Theodore William Austin, Jr.**

14 Q. And Mr. Austin, have you ever had your
15 deposition taken before?

16 A. **Negative.**

17 Q. The way it works is not terribly
18 complicated. I will ask you a series of questions
19 and if you understand them, you will answer them. If
20 you don't understand a question that I ask, though, I
21 would just ask that you bring that to my attention
22 and I'll try to ask a better question, so that you --

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1 so that we are communicating. It's not an endurance
2 contest, you know. If you need to take a break, just
3 say so. I would only ask that you not take a break
4 while a question is pending, okay?

5 **A. Okay.**

6 Q. You stated your name for the record and
7 what is your address?

8 **A. My house?**

9 Q. Yes.

10 **A. Where I live?**

11 Q. Yes.

12 **A. 1234 Massachusetts Avenue, Northwest, Apt.**
13 **601, Washington, D.C., 20036. I'm sorry. 20005.**

14 Q. And what line of work are you in?

15 **A. I have two jobs, actually. I work for --**
16 **during the day, I work at Carnegie Endowment for**
17 **International Peace in office services there, and I'm**
18 **also a doorman at a nightclub, at night.**

19 Q. And could you give us a brief rundown of
20 your educational background?

21 **A. Some college.**

22 Q. Where was that?

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1 this lawsuit, Charles McNair and others versus
2 Synapse Group, Inc.?

3 **A. That's correct.**

4 Q. And how did you come to find out about
5 this lawsuit?

6 A. I went -- after calling Synapse to try to
7 cancel a magazine and get my money back, I was a
8 little frustrated that I couldn't talk to a human, so
9 I Googled anything about Synapse. I just wanted to
10 talk to a person, and what I found was rip-off report
11 and I read that, a little bit about that. And it
12 said that there was more people that had the same
13 type of problem with this, with Synapse. And I
14 clicked on that link, which led me to another page
15 that I filled out information. And then I got an
16 email back regarding the class action suit.

17 Q. Who emailed you?

18 A. I believe it was Michael Greene.

19 Q. Do you recall when that was?

20 A. It was during the summer.

21 Q. The summer of this year?

22 A. This year. Yes. This year.

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1 that?

2 A. Yes. It was during lunch. It's when I
3 always relieve the receptionist so she can go to
4 lunch.

5 Q. Do you recall there being a button on the
6 screen that you saw that in addition to continue or
7 yes, there was another button that said no thanks?

8 Did you see a button like that?

9 A. There might have been a no thanks or
10 cancel. This is a long time ago. I'm not sure. I'm
11 not sure.

12 Q. In terms of the time frame when you
13 selected these magazines that day on the Internet,
14 could it have been in April 2006?

15 A. April 2006. Yes it could have been April
16 2006. Did I say April 2005?

17 Q. Yes.

18 A. Correction. I didn't move to D.C. until
19 October of 2005, and so yes. That would probably --
20 I started at Carnegie in March of 2006. So yes. It
21 would be -- that would be it. April or May.

22 Q. After you visited the website, did you --

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1 and let me start again, and make sure I ask you this
2 clearly. After that day when you selected these
3 three magazines as you've described it, did you go
4 back to that website again on the following day in an
5 attempt to either -- well, for any reason? Do you
6 recall doing that?

7 **A. No.**

8 Q. Other than the time you have just
9 described, was there any other time when you selected
10 magazines on a website?

11 **A. There might have been a time before that.**

12 Q. Is it your recollection that you ordered
13 Maxim, ESPN and National Geographic at the same time,
14 and on the same day during that same visit to -- to
15 the web that you described earlier?

16 **A. Yes.**

17 Q. Is it possible that you ordered two of the
18 magazines in March of '06 and then -- Maxim and ESPN,
19 and then ordered National Geographic a month later in
20 April of '06?

21 **A. I'm not exactly sure, because -- and the**
22 **reason I say that is because I had a subscription**

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1 with National Geographic magazine. And I know that I
2 was getting two of them every month, so I called
3 National Geographic and I asked them to cancel my
4 subscription. And they said that they had me on --
5 that they had me on there twice.

6 At the time, I didn't think -- I mean,
7 still, I don't know whether there was an actual
8 connection between whether it was from Synapse or
9 from me ordering from National Geographic, but I know
10 they were billing me twice. And I was getting two
11 sets of magazines, and I have a very small mailbox
12 and it was clogging --

13 Q. That's a big magazine?

14 A. Well, two of them. And then along with
15 other magazines I was getting at the time, I was
16 single, living in a very small efficiency apartment,
17 so it was like I needed something to --

18 Q. So were you able to cancel one of them?

19 A. Yes.

20 Q. How did you go about doing that?

21 A. I called National Geographic, went through
22 a few prompts and got an operator. And then I was

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1 talking to someone and she asked if I would like to
2 cancel, and I said yes. And then I think that was
3 that.

4 Q. Did you have any trouble getting through
5 the prompts to reach the live operator?

6 A. No.

7 Q. Did the live operator try to talk you into
8 keeping your second subscription?

9 A. She might have. I mean, that stuff goes
10 in one ear and -- when I'm focused on doing -- it's
11 like --

12 Q. It goes in one ear and out the other? Is
13 that what you were going to say?

14 A. Yes. It's like no, I just want to cancel.

15 Q. And so was it your intent to cancel one of
16 the National Geographics and continue receiving the
17 other?

18 A. I don't recall at the time. I remember,
19 and I mean, I'm just trying to use memory pegs.

20 Q. Sure.

21 A. I do remember that my mail couldn't be
22 delivered in my mailbox because I had so many

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1 **just look for them on line.**

2 Q. Would you be able to recover your bank
3 statement for the month of July 2006?

4 **A. 2006. I'm sure that that's possible. I
5 know that, to answer your question, yes.**

6 Q. Let me just make sure that I understand.
7 To the best of your recollection, did you or did you
8 not get a refund when you canceled that second
9 National Geographic subscription?

10 MR. BRAUNSTEIN: Object. It's been asked
11 and answered. You can answer.

12 THE WITNESS: Sorry.

13 MR. BRAUNSTEIN: You can answer.

14 THE WITNESS: I don't recall. I don't
15 remember. But I would -- I would think that I did.

16 MR. BRAUNSTEIN: I don't want you to
17 guess. What you know.

18 THE WITNESS: What I know for a fact, I
19 can't remember. I would have to research that. I
20 would have to find out.

21 BY MR. GILBERTSEN:

22 Q. Did you ask the live rep that you spoke

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1 with for a refund?

2 A. I think, now that -- I think I did. I
3 think she said that it would be returned. But what I
4 can't remember was whether I canceled -- I'm -- I
5 think I canceled everything, so it wasn't one or -- I
6 think I canceled both of them and asked for a refund
7 on one of them, because I was being double billed. I
8 was getting double subscriptions of the magazine.

9 Q. And when you say that you would -- you
10 would research it to find out if you got a refund,
11 how would you go about that?

12 A. I would have to just get -- I would have
13 to contact Bank of America and see if I could get two
14 years of bank history of my bank statements. The
15 ones that are on line, I believe, don't go back that
16 far.

17 MR. GILBERTSEN: Mr. Braunstein, may I ask
18 that the plaintiffs do that?

19 MR. BRAUNSTEIN: Can you just -- I'll take
20 it under advisement. If you would follow up in
21 writing, that would be great.

22 MR. GILBERTSEN: Well, I think it would be

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1 responsive to the document request that accompanied
2 the Notice of Deposition.

3 BY MR. GILBERTSEN:

4 Q. Did there come a time when you cancelled
5 the ESPN Magazine?

6 A. Yes.

7 Q. And how did you go about doing that?

8 A. I went on line to check my bank statement
9 and noticed that there was a withdrawal from my bank
10 account for ESPN Magazine. There was a number on
11 there. I called that number. And then I went
12 through an automated service, very -- I thought it
13 was a very confusing automated service to cancel that
14 magazine. It wasn't -- it took some time. I mean, I
15 was looking to speak to, I thought I would be
16 speaking to a human, but I never got that menu. So
17 --

18 Q. How long did it take to cancel the ESPN
19 Magazine through that system?

20 A. Five minutes, five, six minutes. I think.

21 Q. And did you get a refund for that?

22 A. Not immediately. No. It took some time.

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1 Q. How long did it take?

2 A. I can't recall exactly. I remember I
3 checked my bank account for a few days and it didn't
4 appear. And then it took some time for it to appear,
5 but when it did appear, it appeared several days
6 after I made that call. But it took some time, but
7 it did appear.

8 Q. And how about the Maxim title? Were you
9 able -- or subscription. Were you able to cancel
10 that as well?

11 A. Yes. Again, the same thing. Same
12 process. However, on the refund, I was not refunded
13 the same amount that was taken out.

14 Q. Do you recall how much you were refunded?

15 A. Yes. It was a \$20 withdrawal. I was
16 refunded 18.33.

17 Q. So you were charged \$20 for a renewal to
18 Maxim, correct?

19 A. I guess it was -- yes.

20 Q. And do you recall, was that for an
21 additional year of Maxim?

22 A. I don't know -- I didn't know I was even

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1 renewal to them?

2 **A. No. No.**

3 Q. So as far as you're concerned, you've
4 never seen any kind of mailer from Synapse that
5 provides notice of a renewal to these subscriptions
6 and what you could do to either continue receiving
7 them or cancel them?

8 **A. That's correct.**

9 Q. You've indicated that you called some
10 telephone numbers to cancel these subscriptions that
11 we've been talking about. Where did you obtain the
12 telephone number that you called?

13 **A. It was off my bank statement.**

14 Q. Off of your bank statement?

15 A. **That's correct. It shows the -- it said**
16 **TX, TWX or TXW or something like that. And it said**
17 **either Maxim or ESPN. And then it had a 1-800 number**
18 **that's right next to it.**

19 Q. And is that the number that you, those are
20 the numbers that you called for all of the magazines
21 that we've been talking about to cancel them?

22 A. **That's correct.**

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1 Q. May of '07?

2 A. May -- got here on June 11th. Yes. May
3 of '07.

4 Q. Did you have a computer in your home
5 before then?

6 A. Yes, I did.

7 Q. You indicated that for these magazines
8 that we've been talking about today, and your visit
9 to the Internet when those were ordered, that this
10 was from a computer at work while you were relieving
11 the receptionist during her lunch hour. Do you
12 recall that?

13 A. That's correct.

14 Q. Do you have access to a computer -- let me
15 start again. At work, is there a computer that's
16 assigned to you for your use?

17 A. That's correct. Yes, sir.

18 Q. Did you ever receive any email
19 notifications confirming your order of the magazines
20 back in -- when you ordered them?

21 A. I don't believe so. No.

22 Q. And is that true for your computer at

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1 **left, Massachusetts House on the right. Right by --**
2 **going down towards the convention center.**

3 Q. You're pretty close to downtown, like
4 Logan Circle, somewhere around there?

5 A. **Yes.**

6 Q. There is beautiful buildings there as
7 well. So what's the situation where your mailbox is?
8 Do you just have like a rectangular box that's in a
9 matrix of other mailboxes?

10 A. **That's correct. It's about that big.**

11 Q. And you're indicating, but it's hard --

12 A. **It's about that big.**

13 Q. What are the dimensions, would you say?
14 It's like three by five maybe, or less.

15 A. **About four -- maybe four by four, four**
16 **inches -- well, maybe five inches by five inches.**

17 Q. And what -- what's your usual practice
18 with your mail? Do you review it every day?

19 A. **I have my moments. There are times when I**
20 **come in and, the time -- okay, in the routine, a**
21 **normal routine that I try to set up was to when I get**
22 **off work to go check the mail, but the mail didn't --**

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1 I get off at 4:30, the mail gets delivered at five.
2 So I couldn't go check the box. So periodically, I
3 know on Tuesdays, I check the mail. I mean,
4 Wednesdays and Fridays and my roommate also checks
5 the mail occasionally.

6 Q. For how long have you had a roommate?

7 A. About a year, a little over a year. It
8 was not just until recently he started checking the
9 mail because he wasn't paying the full rent, so I
10 controlled the mailbox key as well as some other
11 keys.

12 Q. You did what now? I'm sorry?

13 A. I controlled the mailbox key.

14 Q. I thought you were going to tell me you
15 put him to work?

16 A. No.

17 Q. What are you looking for in this case?

18 What are your losses?

19 A. The last National Geographic where I tried
20 to cancel, I tried to cancel that and it sent me to
21 some survey.

22 MR. BRAUNSTEIN: I'm going to object to

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1 time that this has taken up. I mean, it's not -- I
2 don't know. I mean, other than -- I mean, \$20 got
3 taken out, I got back \$18.33. I mean, during that
4 whole time when my son was here and the money was
5 getting taken out and there was some stress involved.
6 There was -- but other than that, I mean, I would
7 have to say no. I mean, I would like just my money
8 back and you know, as far as monetarily.

9 BY MR. GILBERTSEN:

10 Q. Do you recall the sequence of events from
11 this past summer when you called to try to cancel
12 this last subscription to National Geographic, this
13 was after you had been on the website rip-off.com and
14 you had done that research to find the law firm and
15 you filled out the form, or which came first?

16 A. The actual events went, and that actually
17 happened very quickly. It was the -- I tried to call
18 and cancel. Couldn't cancel. Looked, started -- I
19 then started looking for any information regarding
20 Synapse, so I can speak to someone. I found the
21 report. Filled out the form. Maybe between half an
22 hour and hour later, I was contacted by Michael

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1 **Greene and then I was told at that time.**

2 MR. BRAUNSTEIN: Stop. If you were told
3 by Michael Greene, don't relate --

4 BY MR. GILBERTSEN:

5 Q. Don't tell me what he told you, but you
6 can continue with the chronology of events.

7 MR. BRAUNSTEIN: Anything Mike said to you
8 leave out, but when and how is fine.

9 THE WITNESS: And that's when I stopped
10 trying to contact Synapse. That was it.

11 MR. GILBERTSEN: Let me take one more
12 quick break and we'll wrap things up, I believe.

13 (Recess.)

14 BY MR. GILBERTSEN:

15 Q. Do you remember providing an email address
16 when you were on the Internet ordering the three
17 magazines that we have been talking about this
18 morning?

19 **A. I can't recall for sure.**

20 Q. When you're ordering things on line from
21 Columbia House or Scholastic Books or whomever, what
22 email address do you provide?

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Gilbertsen Exhibit C



Online Banking

MyAccess Checking - 53: Account Activity

Balance Summary

\$280.97
Available Balance
as of 07/25/2007¹

View: Today (July 25, 2007)

All transactions:

Date	Record	Type	Status	Amount	Balance
06/13/2007	RKOFAMEDIA INC				
06/12/2007					
06/12/2007					
06/11/2007					
06/11/2007					
06/11/2007	CHECKCARD 0610 JWX*1KXHXW*ESPN MAG 800-973-2664 NY 24692167161000973349983	CHK	C	\$24.00	\$232.45
06/11/2007					
06/11/2007					
06/11/2007					
06/11/2007					
06/11/2007					
06/11/2007					
06/11/2007					
06/11/2007					
06/08/2007					
06/08/2007					
06/08/2007					
06/07/2007					
06/07/2007					
06/07/2007					

MCNAIR 000043

7/25/2007

06/21/2007

06/21/2007

06/20/2007

06/20/2007

06/20/2007

06/20/2007

06/19/2007 CHECKCARD 0618 TWX1KXHXW MAXIM MAG
80042069198 NY 24692167169000651769116

06/18/2007

06/18/2007

06/18/2007

06/18/2007

06/18/2007

06/18/2007

06/18/2007

06/18/2007

06/18/2007

06/18/2007

06/18/2007

06/15/2007

06/15/2007

06/15/2007

06/13/2007

06/13/2007

06/13/2007

06/13/2007

06/13/2007

06/13/2007

06/13/2007

06/13/2007

06/13/2007 CHECKCARD 0612 TWX1KXHXW ESPN MAG
Stamford NY 74692167163000131636928

MCNAIR 000044

7/25/2007

07/19/2007

07/18/2007

07/18/2007

07/18/2007

07/18/2007

07/18/2007

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07/13/2007

07/13/2007

07/13/2007

07/13/2007

07/13/2007

07/13/2007

07/13/2007

07/13/2007

07/16/2007 CHECKCARD:0715
TWX:H32P55*NTLGE0GRPHC 800-205-9198/NY
24692167196000909911731

\$34.00 \$642.94

MCNAIR 000045

7/25/2007

Gilbertsen Exhibit D

Page 1

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
CIVIL ACTION NO: 2:06-CV-05072 (JLL) (CCC)

CHARLES T. McNAIR, THEODORE :
AUSTIN, DANIELLE DEMETRIOU,
STEVEN NOVAK, ROD BARE, :
USHMA DESAI and JULIE
DYNKO, on behalf of :
themselves and all others :
similarly situated, : DEPOSITION OF:
Plaintiffs, : CHARLES T. McNAIR
-vs- :
SYNAPSE GROUP, INC., :
Defendant. :

B E F O R E:

SHARON B. STOPPIELLO, a Certified Court
Reporter and Notary Public of the State of New
Jersey, at the offices of KELLEY, DRYE & WARREN,
L.L.P., 200 Kimball Drive, Parsippany, New Jersey,
on Monday, November 5, 2007, commencing at 10:30
a.m., pursuant to Notice.

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1 (Various documents are received and
2 marked D-1 through D-3 for identification by
3 the Reporter.)

4 C H A R L E S T. M c N A I R, 17 Pinkneyville
5 Road, Sparta, New Jersey, is sworn.

6 DIRECT EXAMINATION BY MR. CASTELLO:

7 Q Good morning, Mr. McNair. My name is
8 Geoff Castello. I'm an attorney with the law firm
9 of Kelley, Drye & Warren. We represent the
10 defendant in this action. We met a little bit
11 earlier this morning. I'm just going to go over
12 some ground rules for today.

13 The first thing I'm going to ask you to do
14 this morning is just let me finish whatever I'm
15 saying before you speak. The court reporter, who's
16 sitting to your left, is going to take down every
17 word that we say. So if we talk over each other,
18 and I may talk over you, she will not be able to
19 take down our words. So if you're not done
20 answering one of my questions and I start to talk
21 over you, just tell me to stop, let me know that
22 you're not done answering and I'll stop. Okay?

23 If I ask you a question this morning and you
24 answer it, I'm going to assume that your answer is
25 your honest answer. Do you understand that?

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1 A Not always.

2 Q When you purchased the four magazines
3 that came up at the end of your transaction in
4 August of 2005, did any kind of terms and conditions
5 or any offer details pop up on your screen?

6 A No.

7 Q I ask you to take a look at
8 Defendant's Exhibit 3, McNair 1. Would you like to
9 take a moment to read that? I'm going to ask you a
10 couple of questions about it.

11 A Okay.

12 Q Prior to today, Mr. McNair, have you
13 ever seen this document before?

14 A Yes.

15 Q Is this a document that you provided
16 to your attorneys?

17 A Yes.

18 Q Can you tell me what this document
19 is?

20 A It's a confirmation e-mail from, it says
21 their processing for subscriptions.

22 Q Just for the record, McNair 1, which
23 is attached to Defendant's Exhibit 3, reads, "From
24 orders at Mybonuscenter.com to
25 zoespap21c@earthlink.net; is that correct, Mr.

Page 36

1 McNair?

2 A Yes.

3 Q Is that your e-mail address on
4 earthlink.net?

5 A It was at the time.

6 Q And then it lists four magazines; is
7 that right?

8 A Yes.

9 Q Are those magazines that you allege
10 you purchased in the complaint on or about August
11 26th of 2005?

12 A Yes, they are.

13 Q I'd like you to look about
14 three-quarters of the way down the page, and I'll
15 read for you where I'd like you to pick up. It
16 reads, "Your account will be used to process your
17 magazine selections with all the renewal benefits
18 described in the offer details." Do you see that?

19 A Yes.

20 Q When it says, "your account," do you
21 know what that's referring to?

22 A No.

23 Q How did you pay for these four
24 magazines when you purchased them on or about August
25 26th of 2005?

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1 Q And do you recall making one or more
2 calls to an 800 number in connection with these
3 magazines on July 12th of 2006?

4 A I cannot recall.

5 Q Do you recall calling the 800 number
6 that I gave to you earlier, 800-601-1958?

7 A I recall placing calls to more than one
8 number. Whether or not it was that specific number,
9 I do not know. Since I wrote it down, probably,
10 yes.

11 Q Do you recall placing a second call
12 on July 12th of 2006 and inquiring about a charge
13 amount for Time magazine?

14 A Yes.

15 Q Do you recall a prompt to that
16 effect?

17 A No.

18 Q Do you recall indicating to a
19 voice-activated system the second time that you
20 called an 800 number, responding "yes" regarding an
21 inquiry about Time magazine?

22 A Not specifically.

23 Q Do you recall being presented with
24 promotional offers regarding this magazine?

25 A No.

1 Q Do you recall a prompt stating, "Do
2 you want me to cancel just your future charges so
3 you can enjoy the remaining magazines you've already
4 paid for"?

5 A I recall a similar quote, but it did not
6 include the "future" part of it. It said, Do you
7 want to receive the magazines you've already paid
8 for.

9 Q And how did you respond?

10 A That time?

11 Q Yes.

12 A "No."

13 Q Was your intention to cancel your
14 subscription that was currently existing?

15 A Yes.

16 Q Do you recall hearing the voice --

17 MR. GREEN: If you could just tell us
18 what you mean by "currently existing"?

19 MR. CASTELLO: On July 12th of 2006.

20 MR. GREEN: Okay.

21 MR. CASTELLO: Off the record.

22 (A discussion is held off the record.)

23 Q Do you recall, Mr. McNair, hearing
24 the voice system say, "I'm sorry you didn't enjoy
25 Time magazine. I've processed your cancellation"?

1 is that right?

2 A I thought so, but it never got acknowledged
3 or answered.

4 Q Where did you find the website that
5 you sent the e-mail to? I'll find it in a second.

6 A I no longer remember.

7 Q It was produced as McNair 13, your
8 e-mail dated August 29, 2006 to
9 webmaster@synapsemail.com.

10 A That's it.

11 Q You don't recall how you found that
12 e-mail address?

13 A No, I did not.

14 Q I'd like you to take a look at a
15 couple of pages of credit card statements that you
16 produced, McNair 8 and McNair 9.

17 A Okay.

18 Q On McNair 8 the transaction date of,
19 it looks like June 30, TWX, some letters and
20 numbers, it looks like it's National Geographic
21 Traveler. Do you see that?

22 A Yes.

23 Q And there's a charge for \$17.95. Do
24 you see that?

25 A Yes.

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1 Q If you flip to the next page, there's
2 a transaction date of 7/10. There's a description
3 of Time magazine with an 800 number. Do you see
4 that?

5 A Yes.

6 Q And then a charge for \$54. Do you
7 see that?

8 A Yes.

9 Q A little but further down the page
10 there's a credit for \$54 for Time magazine with that
11 transaction date of July 13th. Do you see that?

12 A Yes.

13 Q I believe you testified earlier that
14 that came about as a result of you contacting your
15 credit card company directly and disputing that
16 charge; is that right?

17 A I can say that I did contact the credit
18 company and disputed the charge.

19 Q You did dispute that charge through
20 your credit card company; is that right?

21 A That's correct.

22 Q And you believed that back in May of
23 2006, when you called the 800 number, that you had
24 already canceled Time magazine; is that right?

25 A That's also correct.

1 prior to or after first contacting an attorney?

2 A Prior to.

3 Q Who was the first attorney that you
4 contacted in connection with this matter?

5 A Attorney Green.

6 Q Had Mr. Green represented you in any
7 prior actions?

8 A No.

9 Q Had he ever represented you in any
10 matter prior to your first contact with him about
11 this particular matter?

12 A No.

13 Q How did you come across Mr. Green's
14 name?

15 A Via the internet.

16 Q What did you do?

17 A I contacted him.

18 Q I wasn't clear. You got on the
19 internet. What were you searching for on the
20 internet?

21 A I was searching for an address or a method
22 of contact for Synapse.

23 Q And how did you come across Mr.
24 Green's name?

25 A My recollection is that when I Googled

Page 95

1 Synapse, one of the choices it came up with was his
2 law firm.

3 Q Was that a website for his law firm?

4 A Yes.

5 Q Do you recall what that website said
6 about Synapse?

7 A Not in detail, however, there is a
8 disclosure document somewhere in this packet or
9 packets.

10 Q If not in detail, can you tell me
11 what you remember about Mr. Green's law firm's
12 website and Synapse?

13 A Basically that there was a possibility of a
14 class action lawsuit.

15 Q Other than Mr. Graifman and Mr.
16 Diamond, did you ever speak with any other attorneys
17 about this matter?

18 A No. In addition to Mr. Green.

19 Q I'm going to ask you if you could,
20 please, to take a look through what we marked as
21 Defendant's Exhibit 3, and just see if you can find
22 a document in there. I believe you testified it
23 might be in there, or somewhere else, a disclosure
24 form, I believe you called it.

25 A Well, it is apparently not in here. That

Gilbertsen Exhibit E

McNair v Synapse Group-Demetriou 11-12-07.txt

1

1 UNITED STATES DISTRICT COURT
2 DISTRICT OF NEW JERSEY (NEWARK)
3 CASE NO. 2:06-cv-05072 (JLL) (ccc)

4

5 CHARLES T. MCNAIR, THEODORE :
6 AUSTIN, DANIELLE DEMETRIOU, :
7 STEVEN NOVAK, ROD BARE, USHMA :
8 DESAI AND JULIE DYNKO, ON :
9 BEHALF OF THEMSELVES AND ALL :
10 OTHERS SIMILARLY SITUATED, :

11

12 Plaintiff, : CIVIL ACTION
13 vs. : Deposition of:
14 : DANIELLE
15 : DEMETRIOU
 : 11/12/07

16 SYNAPSE GROUP INC., :

17

18 Defendants.

19 - - - - -

20 DEPOLINK
21 COURT REPORTING & LITIGATION SUPPORT SERVICES
22 ONE RIVERFRONT PLAZA
23 NEWARK, NJ 07102
24 (973) 353-9880
25

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2

1 McNair v Synapse Group-Demetriou 11-12-07.txt
2 T R A N S C R I P T of the stenographic

3 notes of the proceedings in the above-entitled
4 matter, as taken by and before RALPH MONTE, a
5 Certified Court Reporter and Notary Public of the
6 State of New Jersey, held at the offices of Green
7 & Pagano, 522 Route 18, East Brunswick, New
8 Jersey, on Monday, November 12, 2007, commencing
9 at approximately 1 o'clock in the afternoon,
pursuant to notice.

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1 A P P E A R A N C E S:
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24 McNair v Synapse Group-Demetriou 11-12-07.txt
April of '07 marathon out in Tempe, Arizona. And
25 I've redacted the personal information of the

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22

DIRECT-EXAMINATION BY MR. GILBERTSEN:

1 person who was doing that.
2 But it just, in order to get some context
3 here and refresh your recollection, it shows this
4 offer on the 1, 2, 3, 4, the fifth page of this
5 exhibit, shows this type of offer that I believe
6 you were just describing. But I guess is what I
7 would ask you, if this is, to your recollection,
8 how it was presented to you by the Active.com site
9 when you were visiting it. I'm not asking you
10 that yet, but I will.

11 And as well as this other information
12 here about a disclosure on the automatic renewal
13 authorization, just whether you recall seeing
14 things like that when you visited the Active.com
15 site and initially subscribed to the magazines
16 that are at issue here in your case.

17 MR. M. GREEN: Okay. Before
18 she answers the question I want to place
19 a number of objections on the record.

20 First is that, this is the
21 first time that plaintiff's counsel or
22 the plaintiff has had an opportunity to
23 see this document. As was represented by
24 defense counsel this is not a

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24

DIRECT-EXAMINATION BY MR. GILBERTSEN:

1 continue in that vein.

2 MR. M. GREEN: Well, in
3 addition, this document, and we don't
4 have any -- so this is D-6.

5 MR. GILBERTSEN: D-7.

6 MR. M. GREEN: D-7 has, I think
7 you identified it as the fourth page,
8 fifth page, in this box in small print it
9 says, automatic renewal authorization.

10 It continues on Page 6.

11 I guess that is a blowup of
12 that box? Is that what Page 6 is?

13 MR. GILBERTSEN: Right. You
14 scroll down and you can get the full text
15 of it.

16 MR. M. GREEN: Well, that's my
17 question. And I think it's a proper one.
18 Is that, are we seeing the full text or
19 are you going to represent that is, in
20 fact, the full text on Page 6 of what is
21 a small box on Page 5 under automatic
22 renewal authorizations?

23 MR. GILBERTSEN: Yes.

24 MR. DIAMOND: The syntax
25 appears to be off between that first box

McNair v Synapse Group-Demetriou 11-12-07.txt

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25

DIRECT-EXAMINATION BY MR. GILBERTSEN:

1 and the second box.

2 MR. GILBERTSEN: Do you have
3 any other objections before I continue?

4 MR. M. GREEN: Well, I guess
5 we'd like to have identified what date
6 this was actually printed out, this
7 screen shot on pages 5 and 6.

8 MR. GILBERTSEN: I'll try to
9 get that information for you. But for
10 the limited purposes for which I've
11 introduced this to see if I can refresh
12 the witness' recollection about what she
13 saw at the Active.com site, you know, it
14 could be neither here nor there.

15

16 (whereupon a discussion was
17 held off the record.)

18

19 MR. M. GREEN: Go ahead. Now,
20 I just want to caution the witness that
21 when you are asked the questions, before
22 you answer, okay, just allow me to object
23 if I'm going to object before you answer.

24 THE WITNESS: Sure.

25 MR. M. GREEN: All right.

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DIRECT-EXAMINATION BY MR. GILBERTSEN:

1 A They registered us. We filled out forms
2 through Leukemia and Lymphoma Society with who our
3 guests are going to be, what size tri suit we
4 need, all that, if we're going to be flying down
5 with them.

6 They supplied us with the forms and they
7 registered us. Because we got a group rate.
8 There were a number of us doing it.

9 Q Let's just call that entity the
10 society?

11 A Okay, sure.

12 Q Why was the society directing
13 you to the Active.com site, if you recall?

14 A I think it had to do with if we were
15 looking to do this on our own, or to do any other
16 sort of races, or if we needed to get equipment
17 like a bike, or you know, anything for running or
18 shoes. Active.com does discounts.

19 If you're a member of Active.com they
20 give you a membership card. And you can take that
21 to like a Sports Authority and get a 10 percent
22 discount.

23 Q Okay. So when you visited
24 Active.com the screen shots that you saw did not
25 include registration for a particular race?

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1 A Correct.

2 Q Not Pat's Run in Tempe, Arizona
3 other any other race?

4 A No, correct.

5 Q okay. So we'll skip those
6 pages, but at the bottom of Page 5, the format
7 here of the information about these magazines
8 subscription deals, is that similar to what you
9 saw to the best of your recollection?

10 A I don't recall.

11 Q Okay.

12 A I do remember it saying 6 months. I
13 don't know what form it said it. I don't know, I
14 don't recall.

15 Q Okay. Do you remember seeing
16 an automatic renewal authorization at the
17 Active.com site?

18 A No, I do not.

19 Q On the next page of this
20 Exhibit D-7, where what I represent here for you
21 is the language of this automatic renewal
22 authorization, if you were to scroll down and read
23 all of it, taking a moment and reading that
24 language, do you ever recall reading or seeing any
25 language like that in any kind of format or in any

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DIRECT-EXAMINATION BY MR. GILBERTSEN:

1 way at the time you initially subscribed to these
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6 A No.
7 Q Have you registered for any
8 other events on Active.com?
9 A No.
10 Q Did you give an e-mail address
11 to Active.com when you registered?
12 A Yes.
13 Q And you get, periodically you
14 get e-mail notices from them or offers from them
15 through your e-mail address?
16 A Offers, yes.
17 Q Okay. What e-mail address was
18 that?
19 A DaniDemetriou@MSN.com.
20 Q And that's the e-mail at your
21 home computer?
22 A Correct.
23 Q So, I understand that at least
24 from your perspective, after visiting the
25 Active.com site and registering at Active.com you

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DIRECT-EXAMINATION BY MR. GILBERTSEN:

1 selected 3 magazines in response to an offer that
2 was made to you on the Active.com website?
3 A Correct.
4 Q What were the 3 magazines
5 please?
6 A Her Sports Fitness, Shape and Fitness.

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7 Q Did you begin receiving these
8 magazines?

9 A Yes.

10 Q Do you recall how long after
11 you placed this order you started receiving the
12 magazines?

13 A I don't recall an exact time.

14 Q You may not recall the exact
15 time but I guess I'm interested in whether it was
16 fairly immediately thereafter or whether there was
17 some months of delay before the magazines started
18 coming?

19 A I don't recall specifically, but I would
20 say, I would have to say about a month or 2 after.

21 Q Okay. Did you continue
22 receiving the magazines for the time period that
23 you expected to?

24 A Yes.

25 Q Did you read them?

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DIRECT-EXAMINATION BY MR. GILBERTSEN:

1 A Yes.

2 Q Were you familiar with the
3 magazines before you selected them for the
4 subscription offer?

5 A I was familiar with Shape and Fitness.
6 Her Sport Fitness magazine was the first time I
7 read about it. First time I heard about it.

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8 Q Had you ever subscribed to
9 Shape or Fitness before?
10 A No.
11 Q Had you subscribed to other
12 magazines before?
13 A Yes.
14 Q Have you ever been a long-term
15 subscriber to any magazine?
16 A Long-term meaning --
17 Q That you renewed subscriptions
18 for longer than 1 or 2 years?
19 A Yes.
20 Q So there came a time after you
21 were receiving these 3 magazines that certain
22 charges appeared on your Bank of America card
23 account, is that correct?
24 A Yes.
25 Q When did that happen?

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DIRECT-EXAMINATION BY MR. GILBERTSEN:

1 A June.
2 Q Of?
3 A Of 2007.
4 Q Okay. Do you know whether you
5 received any kind of notice from anyone indicating
6 that this was going to happen?
7 A No, I don't recall.
8 Q I just want to make sure I

McNair v Synapse Group-Demetriou 11-12-07.txt

9 understand what you're perspective is.

10 Are you saying that you don't remember
11 seeing anything, or is it your perspective that
12 nothing was ever sent to you?

13 A It is my perspective that nothing was
14 ever sent to me.

15 Q Okay. Do you review your mail
16 every day?

17 A Yes.

18 Q Okay. How do you go about
19 doing that?

20 A I log on and I check my inbox and my junk
21 mail regularly.

22 Q And you're, I'm sorry?

23 A Junk mail.

24 Q Junk mail?

25 A Yes.

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DIRECT-EXAMINATION BY MR. GILBERTSEN:

1 Q Online?

2 A Yes.

3 Q How about the, you know, what
4 they now call snail mail that comes into your
5 mailbox from the Post Office? I guess it has junk
6 mail in it too, but what's your protocol there for
7 reviewing your postage mail?

8 A If it's addressed to me I open it and
9 read it. If it's not, I assume it's junk mail.

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16 against your account?

17 A On June 25th.

18 Q All right. And then was it at
19 that point that you began searching online for
20 information about TWX?

21 A I recall searching when the first charge,
22 when I saw the first charge.

23 I do check my bank account regularly so
24 it could have been on the 14th, the 15th, you
25 know, close to the 14th, but I did the research

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DIRECT-EXAMINATION BY MR. GILBERTSEN:

1 when I saw the Her Sports charge.

2 Q I see. Did there come a time
3 when you called to cancel these magazine
4 subscriptions?

5 A Yes.

6 Q To the best of your
7 recollection when was that?

8 A Around the time that I saw the charge on
9 6/14 for Her Sports.

10 Q Okay. And then what can you
11 tell me about that call?

12 A I called the number, the 1-800 number
13 that was listed on my bank statement. The
14 voice-mail prompt, it said, if you would like
15 to -- this is just from what I can remember, it's
16 not word for word. Press option 1 if you want to

McNair v Synapse Group-Demetriou 11-12-07.txt

17 cancel your subscription and keep renewing or
18 future -- I don't recall exactly what it said.

19 Option 2 was to renew your subscription
20 and option 3 was to cancel and speak to a customer
21 service representative.

22 I pressed option 3. Music started
23 playing. It sounded like I was on hold. It then
24 would say, thank you for holding, we will be with
25 you momentarily, and then it would put me through

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DIRECT-EXAMINATION BY MR. GILBERTSEN:

1 the loop again. Press option 1 for this, option 2
2 for this, option 3.

3 I would say a good hour had went by. I
4 wasn't getting anywhere. I hung up. I did the
5 research and searched on Google TWX and found the
6 blog of Rip-Off, and I saw a number of people
7 complaining about their accounts being charged,
8 unauthorized charges being charged to their
9 account.

10 One blogger, I guess we can call her, him
11 or her, had said, if you're having trouble with
12 the number on your statement call this number and
13 keep pressing zero. I did that. I called the
14 number. I don't recall what the phone number was.
15 I kept pressing zero and, again, it was through a
16 loop. It took me probably another hour or so to
17 get a person on the phone.

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18 Once I finally got the person on the
19 phone I explained what had happened. They had let
20 me know that I authorized this charge. I let them
21 know that I don't recall authorizing anything.
22 They said they would cancel it and give me a
23 refund. And I had let them know that if there are
24 any other magazines out there under my name to
25 please cancel all of them. And they assured me

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DIRECT-EXAMINATION BY MR. GILBERTSEN:

1 that they would and that was it for that phone
2 call.

3 Q What happened next?
4 A In June 25th time period I received
5 another charge from TWX for a different magazine
6 which is Shape. And, I'm sorry, I actually, it
7 was after that. It was when the Fitness magazine
8 subscription went through is when I saw the Shape
9 one on June 25th.

10 So, I called a second time probably
11 around somewhere in July, July 5th time period. I
12 saw the 2 charges, one for Fitness on July 5th,
13 one for Shape on July 25th, and the overdraft
14 charges associated with those transactions.

15 I called back again, went through the
16 loop again. I didn't call the number that was on
17 my account, I called the initial number, the
18 number that I called back in June 14th. Went

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19 through a loop again. It took me about another 2
20 hours on the phone pressing zero, listening to
21 music, pressing zero, listening to music.

22 Finally again after 2 hours got on the
23 phone with somebody. It was a brief conversation.
24 They assured me that they would refund the charges
25 associated with the magazine subscriptions. I had

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DIRECT-EXAMINATION BY MR. GILBERTSEN:

1 told her that I cancelled in June 14th timeframe,
2 that I don't want any more charges, that I already
3 cancelled this, that I should not have been
4 charged. They refunded me my money. I then asked
5 if I could speak to somebody, a supervisor about
6 the overdraft charges.

7 She put me through a supervisor. They
8 had told me to fax my request over to this
9 customer service number for the refund of the
10 charges. And I would say probably a week after
11 July 11th I received a phone call from -- I don't
12 recall the person's name, leaving me a voice-mail
13 of, that they are unable to refund the charges,
14 that this is, I incurred the charges, it is my
15 error, I authorized Shape and Fitness to debit my
16 account and they are not authorized to refund my
17 overdraft charges.

18 Q Is that then your claim in this
19 case is that you want to be compensated for the

McNair v Synapse Group-Demetriou 11-12-07.txt

20 overdraft charges?

21 A My claim as a representative of the class
22 and also for myself is that, yes, I would like to
23 be refunded for myself, but also that this just
24 doesn't happen. It's not right that people get --

25 MR. M. GREEN: If you could let

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DIRECT-EXAMINATION BY MR. GILBERTSEN:

1 her finish her response.

2 A I just don't think it's right that our
3 perception of going onto a website and purchasing
4 one thing our accounts being charged for something
5 entirely different.

6 Q I see. But in terms of actual
7 losses, I understand you to be saying that you
8 were ultimately refunded for these renewals, and
9 that you are asking to be compensated for
10 overdraft charges that Synapse refused to pay you?

11 A It's not only the overdraft charges.

12 It's the aggravation of being on hold for 4 hours
13 while at work. Because I call, when I tried to
14 call when I got home at 6:30 at night I was unable
15 to get anybody. So I had to spend a total of 4
16 hours or so, 4-and-a-half hours with actually
17 speaking to somebody, during my work hours. And
18 on top of the overdraft charges being charged to
19 me.

20 Q Is there any other category or
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22 Q It stands for interactive voice
23 response system.

24 The Synapse system is the one you talk
25 about when you first called in on June 14th, or

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DIRECT-EXAMINATION BY MR. GILBERTSEN:

1 thereabouts. You were given menu options. I'm
2 going to refer to that as the IVR.

3 A Okay.

4 Q Was June 14th the first time
5 you ever called into Synapse?

6 A Not specifically on June 14th, around
7 that time, yes, yes.

8 Q Okay. Is it your testimony
9 that you did not transact any business on the IVR
10 that you immediately began to try to get to a live
11 operator?

12 A I don't understand the question.

13 Q Let me just put it simply.

14 Is it your testimony that you did not
15 conduct and complete any transactions, any
16 cancellations on the Synapse IVR system?

17 A Yes.

18 Q Other than the calls into
19 Synapse that we have or that you have talked about
20 already have you made any other calls into
21 Synapse?

22 A No.

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23 Q So, is it the case that the
24 last call you made to Synapse was at or around the
25 time you faxed in this document that we've marked

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DIRECT-EXAMINATION BY MR. GILBERTSEN:

1 as Exhibit D-9?

2 A Yes.

3 Q And since sending that fax to
4 Synapse have you placed any more calls into that
5 company?

6 A No.

7 Q Do you know whether anyone else
8 has made any calls into Synapse on your behalf?

9 A No, I don't recall.

10 Q Okay. Have you directed anyone
11 to make any calls into Synapse on your behalf
12 since that time?

13 A No.

14 Q Exhibit D-9 shows an overdraft
15 charge on the 25th of June and it has, it's
16 circled and the letters 2B are written there. Do
17 you see that?

18 A Yes.

19 Q You wrote that, correct?

20 A Yes.

21 Q Does that correspondence to
22 what you write in the first page of your fax
23 2B:6/26/07 overdraft charge for the 6/25/07

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DIRECT-EXAMINATION BY MR. GILBERTSEN:

1 Q Resulting in a negative balance
2 of \$3.31. And then according to this document,
3 again we are on Exhibit D-9, and the fourth page
4 of the document, then they present the charge for
5 Shape magazine with the toll free number here.
6 So, it's a \$21 presentment being charged against a
7 negative balance of \$3.31, end result, negative
8 balance of \$24.31. Do you see that?

9 A Yes.

10 Q Now, if the Shape magazine
11 charged had been settled before the Rahway, New
12 Jersey presentment, it would have been a \$21
13 charge against an existing balance of \$201.69 and,
14 therefore, there would have been no overdraft?

15 A That's correct.

16 Q Correct?

17 A Yes.

18 Q Okay. But the order in which
19 Bank of America settled and batched these 2
20 activities from the 25th of June, I guess my
21 question to you is, are you aware of any policy at
22 Bank of America that dictated the order in which
23 they batched and settled those 2 activities?

24 A I don't.

25 MR. GILBERTSEN: Why don't we

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DIRECT-EXAMINATION BY MR. GILBERTSEN:

1 Q And then on the 6th of July
2 there's an item on the prior page that you labeled
3 1B, which is an overdraft item fee for activity of
4 7/06, correct?

5 A Yes.

6 Q Thirty-five dollars.
7 And below that there's another overdraft
8 item fee for that same, that's issued on that same
9 day of the 6th of July and that is for other
10 activity, electronic transfers of the 5th of July,
11 is that correct?

12 A Yes.

13 Q The account had a negative
14 balance as of the 3rd of July, 2007, correct?

15 A Uh-huh.

16 Q And it had several items that
17 were presented unrelated to Synapse that resulted
18 in negative balances until the 6th of July when
19 there was a deposit from Indirect, is that
20 correct?

21 A Yes.

22 Q Back to the chronology that we
23 were first talking about when we got started, you
24 indicated when you saw, you indicated a time
25 period during which you saw the Green & Pagano

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McNair v Synapse Group-Demetriou 11-12-07.txt

DIRECT-EXAMINATION BY MR. GILBERTSEN:

1 website and responded to it, and then you got a
2 call back eventually from Mr. Green?

3 A Yes.

4 Q when did you agree to become a
5 plaintiff in this case?

6 A When he --

7 MR. M. GREEN: Hold on a
8 second.

9

10 (whereupon a discussion was
11 held off the record.)

12

13 MR. M. GREEN: Go ahead, you
14 can answer the question.

15 A When he explained to me what the, what
16 his part was in this whole thing.

17 Q Don't disclose to me anything
18 like that that he told you, okay. I'm not asking
19 you for information like that.

20 A Okay.

21 Q I don't mean to be abrupt with
22 you either.

23 A Sure.

24 Q I'm simply asking when?

25 A I would -- around the time period of

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DIRECT-EXAMINATION BY MR. GILBERTSEN:

1 July 11th.

2 Q Okay. You testified earlier
3 about seeing a Complaint. Let me hand you a
4 document that's been marked on a previous
5 deposition as D-2, and ask if you recognize this
6 document?

7 A Yes.

8 Q Have you seen it before?

9 A Yes.

10 Q This document was filed in
11 court on August 2nd of 2007. Did you see it
12 before August 2nd?

13 A I don't recall the exact date, but I
14 remember seeing it in an e-mail.

15 Q Okay. Did you see the prior
16 drafts of this document?

17 A Yes.

18 Q There was an amendment to it.
19 There was a first draft and then -- I'm assuming
20 this is the amendment. Did you review the
21 allegations -- let me start again.

22 Did you review parts of this document
23 that deal with yourself?

24 A Yes.

25 Q And did you ever suggest any

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DIRECT-EXAMINATION BY MR. GILBERTSEN:

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Gilbertsen Exhibit F

COPY

Page 1

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY (NEWARK)
2:06-CV-05072 (JLL) (CCC)

-----X

CHARLES T. McNAIR, THEODORE
AUSTIN, DANIELLE DEMETRIOU,
STEVEN NOVAK, ROD BARE, USHMA
DESAI and JULIE DYNKO on behalf
of themselves and all others
similarly situated,

Plaintiffs,

vs.

SYNAPSE GROUP, INC.,

Defendant.

-----X

DEPOSITION OF USHMA DESAI
MONDAY, NOVEMBER 26, 2007

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2 (Pages 2 to 5)

Page 2	Page 4
1 Deposition of USHMA DESAI taken in the 2 above-entitled matter before Mark Iuzzolino, a 3 Certified Shorthand Reporter (License No. X101103) 4 and Notary Public of the State of New Jersey, 5 taken at the offices of KELLEY DRYE & WARREN LLP, 6 200 Kimball Drive, Parsippany, New Jersey, on 7 MONDAY, NOVEMBER 26, 2007, commencing at 8 10:02 a.m. 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25	1 2 INDEX 3 4 WITNESS EXAMINED BY PAGE 5 USHMA DESAI 6 Ms. Mazzuchetti 5 7 8 EXHIBITS 9 10 NUMBER DESCRIPTION PAGE 11 D-11 Document entitled Request 5 12 for Documents to be 13 Produced 14 D-12 Bank statement dated 5 15 September 12, 2006, to 16 October 12, 2006 17 18 REQUESTS 19 20 PAGE LINE 21 36 10 22 60 11 23 66 21 24 74 3 25 112 6
1 APPEARANCES: 2 3 DIAMOND LAW OFFICE, LLC 4 1605 John Street, Suite 102 5 Fort Lee, New Jersey 07024 6 (201) 242-1110 7 BY: PAUL DIAMOND, ESQ. 8 Attorney for the Plaintiffs 9 10 KELLEY DRYE & WARREN LLP 11 200 Kimball Drive 12 Parsippany, New Jersey 07054 13 973-503-5910 14 BY: LAURI A. MAZZUCHETTI, ESQ. 15 AND 16 GEOFFREY W. CASTELLO, ESQ. 17 Attorney for the Defendant, Synapse Group, Inc. 18 19 GREEN & PAGANO, LLP 20 522 Route 18 21 East Brunswick, New Jersey 08816 22 732-390-0480 23 BY: MICHAEL S. GREEN, ESQ. 24 Attorney for the witness Ushma Desai 25	1 (Document entitled Request for Documents 2 to be Produced is marked as Defendant's Exhibit 11 3 for Identification. 4 Bank statement dated September 12, 2006, 5 to October 12, 2006, is marked as Defendant's 6 Exhibit 12 for Identification.) 7 USHMA DESAI 8 52 Alexandria Drive, Hackettstown, New Jersey 9 07840, having been first duly sworn, was examined 10 and testified as follows: 11 12 DIRECT EXAMINATION 13 BY MS. MAZZUCHETTI: 14 Q. How are you, Ms. Desai? My name is 15 Gloria Mazzuchetti. I'm with the law firm of 16 Kelley Drye & Warren, and we represent the 17 defendant Synapse Group in this action. Before we 18 start, I'm going to give you some ground rules for 19 your deposition today. 20 Have you ever had your deposition taken 21 before? 22 A. No. 23 Q. Okay. Essentially it will be a 24 question-and-answer session where I will ask you 25 questions, and you will provide answers. I ask

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<p>1 that you, please, let me speak and finish what I'm 2 saying before you begin to speak because, as you 3 will see, sitting to your left is a court reporter 4 who is going to prepare a transcript of everything 5 that we say today. And obviously, if we speak at 6 the same time, it will make his job much more 7 difficult.</p> <p>8 Do you understand this instruction?</p> <p>9 A. Yes.</p> <p>10 Q. I also ask that your responses be 11 verbal, no shaking the head --</p> <p>12 A. Right.</p> <p>13 Q. -- because if you shake your head or 14 nod, the court reporter will not be able to take 15 that down.</p> <p>16 Do you understand that?</p> <p>17 A. Yes.</p> <p>18 Q. Have you ever testified in court before?</p> <p>19 A. No.</p> <p>20 Q. Okay. Well, even though that we're in a 21 more -- a less formal setting than a courtroom, do 22 you understand that you are under oath today and 23 that we expect your testimony to be truthful?</p> <p>24 A. Yes.</p> <p>25 Q. If you don't understand a question,</p>	<p>1 do not break while a question is pending. I will 2 ask you to provide an answer before we take a 3 break.</p> <p>4 Do you understand that?</p> <p>5 A. Yes.</p> <p>6 Q. Do you have any questions?</p> <p>7 A. No.</p> <p>8 Q. Did you review any papers or documents 9 to prepare for this deposition?</p> <p>10 A. Yes.</p> <p>11 Q. What did you review?</p> <p>12 A. I reviewed the amended complaint --</p> <p>13 Q. Anything else?</p> <p>14 A. -- and also the letter of deposition.</p> <p>15 Q. The deposition notice?</p> <p>16 A. Yes.</p> <p>17 Q. Anything else?</p> <p>18 A. I believe that was it.</p> <p>19 Q. When did you review these documents?</p> <p>20 A. Well, initially I reviewed the 21 deposition notice. I believe it was last month.</p> <p>22 Q. And what about the amended complaint?</p> <p>23 A. The amended complaint I reviewed 24 actually just a few days ago.</p> <p>25 Q. Other than reviewing documents, did you</p>
Page 7	Page 9
<p>1 please let me know. If you answer my question, 2 I'm going to assume that you understood the 3 question.</p> <p>4 Are you suffering from any illness or 5 condition today that would prevent you from 6 providing truthful testimony?</p> <p>7 A. No.</p> <p>8 Q. Did you consume any substance or take 9 any medication that would affect your memory?</p> <p>10 A. No.</p> <p>11 Q. Did you consume any substance or take 12 any medication that would prevent you from 13 providing truthful testimony?</p> <p>14 A. No.</p> <p>15 Q. Is there any reason why you will not be 16 able to testify honestly here today?</p> <p>17 A. No.</p> <p>18 Q. Also, if your attorney objects to one of 19 my questions, I ask that you please stop from 20 answering and allow him to place his objection on 21 the record. I may then have something to say to 22 that, and then he will direct you one way or 23 another whether you should provide an answer. If 24 you need to take a break today, please let me 25 know, and we can take a break, but I ask that we</p>	<p>1 do anything else to prepare for this deposition?</p> <p>2 A. I had a conference call with my 3 attorney.</p> <p>4 Q. And how long did that last?</p> <p>5 A. About an hour.</p> <p>6 Q. Did you meet with your attorney in 7 person in addition to having that conference call?</p> <p>8 A. I met with my attorneys on the 9 telephone.</p> <p>10 Q. Is this the first time that you're 11 meeting them today in person?</p> <p>12 A. Yes, but I have met them over the 13 telephone.</p> <p>14 Q. But you have not previously met them in 15 person?</p> <p>16 A. No.</p> <p>17 Q. Other than speaking with your attorney 18 and reviewing documents, did you do anything else 19 to prepare for the deposition today?</p> <p>20 A. No.</p> <p>21 Q. Have you talked with anyone other than 22 your counsel about today's deposition?</p> <p>23 A. No.</p> <p>24 Q. Did you tell anybody that you were even 25 coming here today?</p>

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<p>1 Q. Do you know what period of time your 2 bank statements are available on line? 3 A. That I'm not sure. 4 Q. Do you know whether they're available 5 for the year 2006? 6 A. Yes. 7 Q. They are available? 8 A. Yes. 9 Q. When you produced this bank statement 10 from last year to your attorney, was that 11 something that you had maintained in paper, or was 12 that something that you pulled off line? 13 A. I pulled it off of my online banking. 14 Q. Did you have the paper statement that 15 was sent to you for that time period? 16 A. No. I could not find it. 17 Q. With respect to your Wachovia Bank 18 account, are you the only account holder on that 19 account? 20 A. Yes. 21 Q. So it's not a joint account with your 22 fiance? 23 A. No. 24 Q. Do you balance your checking account? 25 A. Yes.</p>	<p>1 A. I use my debit card maybe once or twice 2 a day. 3 Q. What kind of purchases do you make with 4 your debit card? 5 A. Usually it's gas and little things here 6 or there, like cigarettes. 7 Q. Do you also have credit cards? 8 A. Yes. I have two credit cards. 9 Q. And are those credit cards linked to 10 your bank account in any way, your checking 11 account? 12 A. Yes. 13 Q. How are they linked? 14 A. For one-time payments. 15 Q. Can you explain that to me? 16 A. Basically I just go into my online 17 banking, and it has my bank account number already 18 on there, or I go to my credit card on line, and 19 it already has my personal checking account on 20 there. So then I instruct my credit card account 21 to make a one-time payment to, you know, pay for 22 my credit card. 23 Q. Okay. You may have already told me 24 this, but do you check your online banking 25 statement for Wachovia Bank on a daily basis?</p>
<p style="text-align: center;">Page 19</p> <p>1 Q. How often do you do that? 2 A. Almost every day. 3 Q. How do you go about doing that? 4 A. I check all my receipts, and every so 5 often I check my online banking. 6 Q. And what process do you go through to 7 make sure that your checking account is balanced? 8 A. I balance my checkbook first because I 9 know that everything I purchase, I keep a receipt 10 for. And I don't make any online purchases, or 11 very rarely I make online purchases, but I keep a 12 receipt for that also. So I usually balance using 13 my receipts, and then if -- I check on line and if 14 there's something on line that I don't know that's 15 being taken out, I check to make sure that there's 16 nothing there that's not being -- or that there's 17 nothing there that shouldn't be, you know, being 18 taken out. 19 Q. When you say that you check receipts, 20 are these receipts generated because you're using 21 a debit card that's linked to your checking 22 account? 23 A. Yes. 24 Q. And how often do you use your debit 25 card?</p>	<p style="text-align: center;">Page 21</p> <p>1 A. No, not on a daily basis. 2 Q. How often do you check it? 3 A. Usually every couple of days just to 4 make sure that my checkbook and my online banking 5 are at the same balance. 6 Q. Do you understand that you are a 7 plaintiff in this case? 8 A. Yes. 9 Q. How did you come to be a plaintiff? 10 A. I was on line looking for ways to cancel 11 a TWX magazine subscription, and I came across the 12 web site of Mr. Michael Green and Paul Diamond. 13 Q. What made you go on the web site to look 14 for TWX magazine? 15 A. Because I just -- you know, it had 16 things about, you know, people, how they were 17 being ripped off by this company and, you know, 18 with, like, charges and overdraft charges, and so 19 I actually sent an e-mail to Mr. Green. 20 Q. When did you do that? 21 A. I did that in -- I believe it was August 22 of this year. 23 Q. Do you know what the date was in August? 24 A. I don't recall. 25 Q. What is TWX?</p>

Page 22	Page 24
1 A. "TWX" is what shows up in my bank 2 account. 3 Q. And what's your understanding of what 4 TWX is? 5 A. Well, on my statement it was showing 6 "TWX magazine," and then it was showing the actual 7 name of the magazine for which the money was being 8 taken out. 9 Q. Is it your understanding that TWX is 10 part of Synapse? 11 A. Yes, now I know that. I didn't know 12 that previously when these charges were being 13 taken out. 14 Q. So when I refer to "Synapse," just so 15 we're clear for the record, I'm referring to TWX. 16 A. Yes. 17 Q. Do you understand that? 18 A. Yes. 19 Q. Okay. And you said that people were 20 being ripped off? 21 A. Uh-huh. 22 Q. Is that a yes? 23 A. Yeah. Sorry. 24 Q. What does that mean? 25 A. It means that, you know, people are	1 overdraft charges in my bank account. And I 2 looked at it, and I'm, like, "You know what? This 3 is the same thing that happened to me." 4 Q. Do you know any of the people who posted 5 user messages? 6 A. No. 7 Q. Did you ever communicate with any of the 8 people that posted user messages? 9 A. No. 10 Q. Did you post your own user message? 11 A. No. 12 Q. Other than ripoff did you look at any 13 other web sites? 14 A. No. 15 Q. So how did you come to the ripoff web 16 site? Did you Google or do some sort of search, 17 term seven for TWX? 18 A. Yeah, I Googled it. 19 Q. Do you know when you did that? 20 A. That was in early August. 21 Q. What did you do after you found this 22 ripoff web site? 23 A. Well, I found this 800 number for which 24 I could try and cancel these subscriptions because 25 initially when the money had been taken out of my
Page 23	Page 25
1 signing up for, you know, whatever this magazine, 2 you know, says, like, you know, "Oh, we'll give 3 you three issues or three" -- yeah -- "three 4 issues a month for free, and then, you know, you 5 can decide whether you want the magazine or not." 6 And then, you know, people end up getting, you 7 know, charged in their bank account, and they 8 have, you know, these charges for these magazines 9 being taken out, and then they have overdraft 10 charges because they were not forewarned that this 11 money was going to be taken out. 12 Q. How did you learn that there were these 13 other people out there that you determined were 14 being ripped you? 15 A. Because I actually went on ripoff.com. 16 Q. How did you get to the ripoff.com web 17 site? 18 A. Well, when I was looking for how to 19 cancel this TWX subscription, then I found this 20 web site called "ripoff.com," and it actually had 21 an 800 number for which you could try and, you 22 know, cancel your subscriptions. And there were 23 all these, you know, little user messages saying 24 that, you know, because this magazine took out 25 money without my knowing it, then, you know, I got	1 account, I went to Spin magazine, I went to Vibe 2 magazine, I went to Maxim. I went to Sports 3 Illustrated. I went to all of their web sites, 4 and I tried to contact their customer service. 5 And apparently they were saying that I did not 6 have a subscription through them. So then this 7 year I saw that there was a hold put on, like, a 8 2-dollar hold from this TWX magazine in my 9 account, and I was, like, "I'm not going through 10 this again." 11 Q. So you're saying that back -- in 2006 12 you contacted the magazines directly? 13 A. Yes. 14 Q. Why didn't you Google TWX at that time? 15 A. Because I didn't even realize that it 16 was, you know, through TWX. I just figured I 17 would call the magazines themselves. 18 Q. Did you do anything else in 2006? 19 A. No. 20 Q. So what happened -- strike that. 21 Did you print out anything from this 22 ripoff.com web site? 23 A. No. 24 Q. Did you print out anything whatsoever 25 regarding TWX or Synapse from the internet?

Page 26	Page 28
<p>1 A. No. All I did was, I wrote down the 800 2 number on ripoff.com that they gave to cancel the 3 TWX subscriptions.</p> <p>4 Q. Did you call that 800 number?</p> <p>5 A. Yes.</p> <p>6 Q. When did you call that 800 number?</p> <p>7 A. I called that 800 number early August.</p> <p>8 Q. Was it on the same day that you were 9 doing your Google search?</p> <p>10 A. Yes.</p> <p>11 Q. Was it on the same day that you sent an 12 e-mail to Mr. Green's law firm?</p> <p>13 A. Yes.</p> <p>14 Q. After you sent the e-mail to Mr. Green's 15 law firm, when was the first time that somebody 16 contacted you regarding this case?</p> <p>17 A. It was probably about the next day or a 18 couple of days later.</p> <p>19 Q. Who contacted you?</p> <p>20 A. Mr. Green, and also actually Mr. Paul 21 Diamond at the same time.</p> <p>22 Q. They called you on the telephone?</p> <p>23 A. Yes.</p> <p>24 Q. I'm going to show you a document that 25 was previously marked as Defendant's Exhibit 2.</p>	<p>1 A. No.</p> <p>2 Q. You don't know whether you did, or you 3 did not review it?</p> <p>4 A. No, I did not.</p> <p>5 Q. When you were e-mailed the complaint 6 previously -- let's just see if we can get 7 somewhat of a timeline down.</p> <p>8 I know you don't remember specifically, but 9 can you estimate how long ago the complaint was 10 e-mailed to you?</p> <p>11 A. I know that I had seen one in my e-mail. 12 I believe it was back in September or October that 13 Mr. Green had e-mailed to me. I don't remember 14 which version it was.</p> <p>15 Q. Have you seen more than one version?</p> <p>16 A. Well, I had Mr. Green or Mr. Diamond 17 re-e-mail me a second copy.</p> <p>18 Q. Do you have a home computer?</p> <p>19 A. Yes. I have a laptop at home.</p> <p>20 Q. And obviously you have an e-mail address 21 on that laptop. Is that correct?</p> <p>22 A. Yes.</p> <p>23 Q. And what is that e-mail address?</p> <p>24 A. It's just a Yahoo e-mail, 25 desaiu5@yahoo.com.</p>
Page 27	Page 29
<p>1 Please take a moment to look through it and let me 2 know when you are finished.</p> <p>3 A. Done.</p> <p>4 MS. MAZZUCHETTI: For the record, 5 Defendant's Exhibit 2 is a copy of the First 6 Amended Class Action Complaint and Demand for Jury 7 Trial. Is that correct?</p> <p>8 A. Yes.</p> <p>9 Q. When is the first time that you saw this 10 document?</p> <p>11 A. I saw it -- I can't even remember. It 12 was e-mailed to me previously, and then I just 13 recently reviewed it.</p> <p>14 Q. When was it e-mailed to you?</p> <p>15 A. I don't recall. I know it was a while 16 ago.</p> <p>17 Q. Do you know whether you ever saw a draft 18 of Defendant's Exhibit 2 before it was filed with 19 the Court?</p> <p>20 A. I don't recall.</p> <p>21 Q. I will represent to you that Defendant's 22 Exhibit 2 was filed with the Court on August 2, 23 2007.</p> <p>24 Do you know whether you reviewed the First 25 Amended Complaint before August 2, 2007?</p>	<p>1 Q. Did you use that e-mail address to 2 communicate with anyone other than your counsel 3 about this lawsuit?</p> <p>4 A. No.</p> <p>5 Q. Did you use any other e-mail address to 6 communicate with anyone other than your counsel 7 about this lawsuit?</p> <p>8 A. No.</p> <p>9 Q. When you first received the complaint in 10 September or October this year, did you review the 11 parts of the complaint that relate to you?</p> <p>12 A. Yes.</p> <p>13 Q. Did you make sure that those statements 14 were accurate?</p> <p>15 A. Yes.</p> <p>16 Q. And were those statements accurate with 17 respect to you?</p> <p>18 A. Yes.</p> <p>19 Q. What steps did you make to make sure 20 that the statements pertaining to you were 21 accurate?</p> <p>22 A. I read it, and I reviewed it, and I made 23 sure that everything was correct.</p> <p>24 Q. Did you look back at your bank 25 statements or any other records to determine</p>

Page 30	Page 32
<p>1 whether the statements made in the complaint were 2 correct? 3 A. I couldn't find my statements, so I had 4 to find it on line. 5 Q. And when you reviewed the complaint in 6 September or October, did you find your bank 7 statement on line at that point? 8 A. No. 9 Q. When did you first find your bank 10 statement on line? 11 A. I just dug it up from my on line banking 12 a few days ago. 13 Q. Did you ever suggest to your counsel 14 that changes should be made to the complaint? 15 MR. GREEN: I would object. Excuse me. 16 I would object. It's privileged. I'm not going 17 to allow her to answer the question. 18 Q. Just so I understand, your testimony is, 19 you reviewed the complaint, you reviewed the 20 allegations with respect to you, and you 21 determined that all of the allegations in the 22 complaint were accurate? Is that correct? 23 A. Yes. 24 Q. Sorry? 25 A. Yes. Can I take a break?</p>	<p>1 Q. Where did you look? 2 A. I looked in my file folder with all my 3 paper statements where I usually keep them. 4 Q. And the statement that you produced to 5 your counsel was not in that folder? 6 A. No. 7 Q. Did you try to obtain your bank 8 statements off line? 9 A. No. I didn't realize that I couldn't -- 10 that I could find them on line at that time. 11 Q. In the complaint you alleged that you 12 ordered four magazines sometime in 2006: Spin, 13 ESPN, Maxim, and Vibe. Is that correct? 14 A. Yes. 15 Q. How did you order those magazines? 16 A. I was at F.Y.E. with my boyfriend, and 17 we went there to buy a CD or DVD. And, you know, 18 the girl at the counter was, like, "Oh, well, 19 there's this offer you could get, you know, for a 20 free three-month trial of these magazines." So we 21 ended up, you know, signing up for four of them. 22 And there's -- you know, not realizing that, you 23 know, I would be charged. I was, like, "Oh, okay, 24 whatever. A free three-month trial. That's 25 fine."</p>
<p>1 Q. Sure. 2 (There is a recess taken.) 3 BY MS. MAZZUCHETTI: 4 Q. Ready? 5 A. Yes. 6 Q. Did you speak with anyone other than 7 your counsel on your break? 8 A. No. 9 Q. You testified earlier that you asked for 10 the amended complaint a second time? 11 A. Yes. 12 Q. Why did you ask for it for a second 13 time? 14 A. Because I couldn't find it in my e-mail 15 when I went to go back and look at it. 16 Q. I want to go back in time. When you 17 reviewed it for the first time, you had indicated 18 that -- I had asked you whether you made -- strike 19 that -- I had asked you whether you reviewed your 20 bank statements, and you indicated that you had 21 not. 22 Did you look for your bank statements at that 23 time? 24 A. I tried to, and I didn't realize that I 25 could find it through my online banking.</p>	<p>1 Q. What is F.Y.E.? 2 A. F.Y.E. is a store, an electronics store, 3 kind of. It sells CDs, DVDs, video games. 4 Q. And do you recall when you made this 5 purchase at F.Y.E. where you signed up for this 6 magazine special offer? 7 A. No, I don't recall exactly when it was. 8 Q. Do you recall what year it was in? 9 A. Yes. It was 2006. 10 Q. Do you recall what month? 11 A. No. 12 Q. And you testified that you were with 13 your boyfriend. Was that your fiance now? 14 A. Yes. 15 Q. If I tell you that Synapse's record 16 indicates that your purchase at F.Y.E. was made 17 somewhere in or around June 17, 2006, does that 18 sound about right to you? 19 A. That would make sense. 20 Q. Do you know whether you ordered all four 21 magazines at the same time? 22 A. I'm pretty sure. 23 Q. How often do you shop at F.Y.E. music 24 store? 25 A. Very rarely. I don't live near the mall</p>

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1 A. Just basically, you know, "Which 2 magazines can we pick from?" 3 Q. What else? 4 A. That's it. And then we told which 5 magazines we wanted. 6 Q. Who made the decision as to what 7 magazines you would order? Was that decision made 8 by yourself? 9 A. No. My boyfriend and I discussed it. 10 Q. What did you and your boyfriend discuss? 11 Tell me about that conversation. 12 A. Well, he just picked, you know, three 13 magazines that he wanted, and, you know, we kind 14 of both agreed on one magazine as our fourth. 15 Q. Which magazines did your boyfriend want? 16 A. He wanted the ESPN, Vibe, and Maxim. 17 Q. And you agreed on Spin as your fourth? 18 A. Yes. 19 Q. Did you receive any offer details from 20 the clerk? 21 A. No, not that I recall. 22 Q. Did the clerk give you any written 23 materials? 24 A. Not that I recall. 25 Q. How long did it take you to select your	1 Q. What magazines did you previously 2 subscribe to? 3 A. Shape magazine. 4 Q. How did you subscribe to Shape magazine? 5 A. I -- well, I've had the subscription for 6 quite some time. The first thing I did was -- I 7 had bought a magazine, and then I sent them one of 8 the little index cards, the mail-back cards that 9 they have inside the magazine. And I sent that, 10 and then I started my subscription because I 11 actually sent a check with it. And then when it 12 comes time to renew, they actually send me a 13 renewal letter with my magazine. And then, you 14 know, it gives options like, oh, I'll pay with my 15 credit card, or I'll write a check, or, you know, 16 bill me later. And so they actually send me some 17 sort of correspondence. 18 Q. And how long have you had the 19 subscription to Shape? 20 A. For about three years. 21 Q. And how long was each subscription term? 22 A. One year. 23 Q. What did the clerk tell you about how 24 long you would receive the special offer for ESPN, 25 Maxim, Vibe, and Spin?
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1 magazines? 2 A. Not very long. We weren't there for 3 that long. 4 Q. About how long were you at the counter 5 to complete the entire transaction? 6 A. I can't even remember. 7 Q. Can you estimate? 8 A. There's no way I can estimate if I can't 9 remember. 10 Q. Were you familiar with each of the 11 magazines before you selected them for the 12 subscription offer? 13 A. Yes. 14 Q. And how were you familiar with those 15 magazines? 16 A. I used to buy Spin at the store, and my 17 boyfriend would buy the other three at the store 18 every once in a while. 19 Q. Have you ever had a subscription to any 20 of these magazines prior to signing up for the 21 subscriptions at F.Y.E.? 22 A. No. 23 Q. Have you ever had a magazine 24 subscription for any magazine? 25 A. Yes.	1 A. All they said was, you just get a free 2 three-month trial offer. 3 Q. Did you have to fill out a form to 4 provide the clerk with your address for the 5 magazines to be delivered to? 6 A. No. 7 Q. How did the clerk have your address? 8 A. Because my boyfriend gave his address 9 verbally. 10 Q. What address was that? 11 A. 109 Mountain Lake Road, Belvidere, New 12 Jersey. 13 Q. Is that where your boyfriend lived at 14 the time? 15 A. Yes. 16 Q. But you did not live there? 17 A. No. So they took the name from my card, 18 and they used his address to mail these things to. 19 Q. So who were these magazines for? Were 20 they for your boyfriend to read or for you to 21 read? 22 A. Well, three of them were for him to 23 read, and one of them was for me. Actually, for 24 both of us to read. 25 Q. Who provided the address to the clerk?

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1 Was it you or your boyfriend? 2 A. No. He gave it. 3 Q. Were you present for the entire time 4 that your boyfriend was speaking with the clerk? 5 A. Yes. 6 Q. Have you talked to your boyfriend about 7 this transaction and this lawsuit? 8 A. No. All I did was yell at him for these 9 magazines, you know, the money being taken out of 10 my account. 11 Q. What did you say to him? 12 A. All I said was, you know, "These 13 magazines are being taken out of my account." 14 I'm, like, "Why?" I'm, like, "Did you, you know, 15 agree to something?" And he's, like, "No." 16 Because -- I was, like, "I was there at the same 17 time you were," so I was, like, "These aren't 18 supposed to be taken out." 19 Q. Did you and your boyfriend have any 20 other conversations about your dealings with TWX, 21 Synapse? 22 A. No. 23 Q. So your boyfriend doesn't even know that 24 you're involved in this lawsuit? 25 A. No.	1 advised you that a magazine subscription would be 2 automatically renewed if they were not canceled 3 after the initial three-month trial period? 4 A. No. 5 Q. So what did you think you were getting 6 with this trial offer? 7 A. Just three months of the magazine for 8 free. 9 Q. Had you ever responded to any other free 10 offers? 11 A. No. 12 Q. So you this is the first time you've 13 ever responded to a free offer? 14 A. Yes. 15 Q. Do you allow your boyfriend to use your 16 debit card to make purchases for himself? 17 A. No. 18 Q. Do you allow anyone to use your debit 19 card to make purchases for themselves? 20 A. No. 21 Q. When did your boyfriend live at the 109 22 Mountain Lake Road address? 23 A. He was living there up until we moved in 24 together in May. 25 Q. Do you know how long he lived there
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1 Q. And you live with him? 2 A. Yes. 3 Q. Did the clerks give you anything to sign 4 with respect to the subscription offer? 5 A. No. 6 Q. When you were paying for your purchase, 7 did you sign a receipt? 8 A. No. Actually -- no. I think I did sign 9 a receipt. 10 Q. Were there any terms and conditions 11 related to this offer on that receipt? 12 A. Not that I saw. 13 Q. Do you know that for sure? 14 A. All I know is that it was just a regular 15 receipt. 16 Q. When you signed the receipt, were you 17 signing an electronic credit card pad, or was it a 18 paper receipt? 19 A. That I don't recall. 20 Q. Did the clerk tell you that the magazine 21 subscriptions would be automatically renewed if 22 they were not canceled after the three-month 23 initial trial period? 24 A. No. 25 Q. Do you remember signing anything that	1 prior to May? 2 A. Since 2003. 3 Q. And who did he live there with? 4 A. His grandmother. 5 Q. Anyone else? 6 A. His uncle. 7 Q. Anyone else? 8 A. No. 9 Q. Do his grandmother and uncle still live 10 at that address? 11 A. His grandmother does, not his uncle. 12 Q. I'm sorry? 13 A. His grandmother does, not his uncle. 14 Q. His uncle lives there, but his 15 grandmother does not? 16 A. No. His grandmother does, and his uncle 17 does not. 18 Q. Okay. After you signed up for the 19 three-month trial subscriptions for the four 20 magazines, did there come a time when you started 21 receiving the magazines? 22 A. Yeah. The magazines started basically, 23 you know, a little bit after we signed up. 24 Q. How long after? 25 A. I'm not sure exactly how long after.

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<p>1 Q. Do you still have the magazines?</p> <p>2 A. My fiance might, unless he threw them</p> <p>3 out.</p> <p>4 Q. And where did all four of those -- to</p> <p>5 what address were all four of those magazines</p> <p>6 delivered?</p> <p>7 A. 109 Mountain Lake Road.</p> <p>8 Q. How do you know they were delivered?</p> <p>9 A. Because I used to see my boyfriend every</p> <p>10 day, so I would actually see these magazines when</p> <p>11 they came in the mail.</p> <p>12 Q. Do you know if he read the magazines?</p> <p>13 A. Yes, he read them.</p> <p>14 Q. Did you read the magazines?</p> <p>15 A. I read a few, yes.</p> <p>16 Q. Do you know that your boyfriend received</p> <p>17 all of the magazines that he was entitled to</p> <p>18 receive under the three-month subscription?</p> <p>19 A. I'm not sure about that.</p> <p>20 Q. Who would know that?</p> <p>21 A. I mean, he probably would. He probably</p> <p>22 doesn't even remember.</p> <p>23 Q. When you were preparing your response or</p> <p>24 searching for documents with respect to this</p> <p>25 document request, did you ask your boyfriend</p>	<p>1 moved to that new location to have all of your</p> <p>2 mail forwarded?</p> <p>3 A. He did.</p> <p>4 Q. Did you?</p> <p>5 A. No.</p> <p>6 Q. Do you know how he did the change of</p> <p>7 address?</p> <p>8 A. Through the post office.</p> <p>9 Q. What did he do at the post office, if</p> <p>10 you know?</p> <p>11 A. Filled out a form for change of address.</p> <p>12 Q. How do you know he did that?</p> <p>13 A. Because I filled it out for him, and I</p> <p>14 mailed it out for him.</p> <p>15 Q. And did that result in his mail being</p> <p>16 forwarded to the new address?</p> <p>17 A. Yes.</p> <p>18 Q. Do you know whether your boyfriend</p> <p>19 specifically changed his address with Synapse or</p> <p>20 TWX?</p> <p>21 A. All I know is that he just did the post</p> <p>22 office form.</p> <p>23 Q. You don't know whether he changed his</p> <p>24 address --</p> <p>25 A. Well, I mean --</p>
<p>1 whether he had any documents?</p> <p>2 A. No.</p> <p>3 Q. Why not?</p> <p>4 A. Because he wouldn't have any documents</p> <p>5 because everything, you know, would just come</p> <p>6 there under my name and his address.</p> <p>7 Q. How would you know if there was mail</p> <p>8 that came to you at that address from Synapse or</p> <p>9 TWX? How do you know that something wasn't</p> <p>10 delivered there for you?</p> <p>11 A. Well, those magazines were the only</p> <p>12 piece of mail that were under my name that came to</p> <p>13 that address because I wasn't living there.</p> <p>14 Q. How do you know that for certain?</p> <p>15 A. Because I saw, when the magazines would</p> <p>16 come in, that they had my name and his address,</p> <p>17 which is why they were delivered to his address.</p> <p>18 Q. Did you ever live at 109 Mountain Lake</p> <p>19 Road with your boyfriend?</p> <p>20 A. No.</p> <p>21 Q. You testified earlier that your</p> <p>22 boyfriend or your fiance and you moved in together</p> <p>23 in May of 2007 to a new place. Right?</p> <p>24 A. Yes.</p> <p>25 Q. Did you do a change of address when you</p>	<p>1 MR. GREEN: I would just object. It's</p> <p>2 my understanding that Synapse didn't have his</p> <p>3 address. They had what they thought was her</p> <p>4 address.</p> <p>5 MS. MAZZUCHETTI: I'm asking the</p> <p>6 witness.</p> <p>7 MR. GREEN: I understand that, but I</p> <p>8 don't want you to confuse our witness. You're</p> <p>9 asking -- let me just understand your question.</p> <p>10 MS. MAZZUCHETTI: No. I prefer that the</p> <p>11 testimony come from your client.</p> <p>12 MR. GREEN: Well, I just want to make</p> <p>13 sure she has a question posed to her that she</p> <p>14 understands.</p> <p>15 MS. MAZZUCHETTI: Well, she'll let me</p> <p>16 know if she doesn't understand.</p> <p>17 MR. GREEN: Could you repeat the</p> <p>18 question?</p> <p>19 MS. MAZZUCHETTI: Can you read the</p> <p>20 question back, please?</p> <p>21 (Counsel requests the reading of the</p> <p>22 following testimony:</p> <p>23 "QUESTION: You don't know whether he</p> <p>24 changed his address --")</p> <p>25 Q. I'll rephrase that.</p>

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1 A. It would be somewhere in between there, 2 yes. It may not be the exact date, but it will be 3 somewhere in there. 4 Q. How many days passed between the day 5 that you first saw the hold on your account in 6 2007 and the date that you went on ripoff.com? 7 A. It was either the same day or the day 8 after. 9 Q. And how many days between -- or how much 10 time elapsed between the time that you pulled up 11 the phone number on ripoff.com and you made the 12 call to Synapse? 13 A. I probably did it within the same day. 14 Q. You're saying "probably." Do you have a 15 recollection of doing it on the same day? 16 A. I might have. 17 Q. And do you remember whether you 18 contacted Mr. Green's office first in the e-mail 19 that you sent or whether you contacted Synapse 20 first? 21 A. That I don't recall. 22 Q. Do you know whether you spoke with 23 Mr. Green prior to making the call to Synapse to 24 cancel the magazines? 25 A. I'm sorry. Can you repeat that?	1 you see the hold on your bank account, you go on 2 line and Google or do a search for TWX, you find 3 ripoffreport, and then you call the number. Is 4 that how it went? 5 A. Yeah. Well, I had two windows open at 6 the same time, the one for Mr. Green's office for 7 that web page, and then the one for the 8 ripoff.com. 9 Q. Okay. Do you know whether the 2-dollar 10 charge that was attached to your account in 2007 11 was removed from your account? 12 A. Yes, it was removed. 13 Q. When was it removed? 14 A. I don't know how long after, but it was 15 after I canceled these magazine subscriptions. 16 Q. Do you have any bank statements that 17 will show the two-dollar-and-1-cent charge? 18 A. Well, if it was on there, and if it was 19 taken off, because it never said on my online 20 banking, "TWX," you know, "plus \$2." Like, they 21 gave you back a 2-dollar credit. It just showed 22 up as on my online bank account, so it may not 23 even be on a paper statement. 24 Q. So it may have just disappeared? 25 A. Basically.
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1 Q. Had you spoke with Mr. Green on the 2 telephone prior to calling Synapse to cancel the 3 magazines? 4 A. No. 5 Q. How do you know that? 6 A. Oh, wait. No. Actually, no, I hadn't. 7 I talked to him after that. 8 Q. How much after that? 9 A. That I don't recall. 10 Q. If you could, just explain to me the 11 chronology because I'm just a little confused. It 12 seems that you don't remember any of the time 13 period when any of these things happened, but how 14 do you remember that you hadn't spoken to 15 Mr. Green yet when you called to cancel your 16 magazines? 17 A. Well, because for all I know while I was 18 trying to cancel these magazines, I could have 19 been typing on the computer e-mailing Mr. Green's 20 office. 21 Q. I'm talking about when you talked to him 22 over the telephone. 23 A. Well, I know that I talked to him after 24 I canceled these magazines. 25 Q. Just to make sure I have this straight,	1 Q. I want to go back to the time when you 2 ordered -- the time shortly after you were signing 3 up for this order. 4 Did there come a time after you signed up for 5 this initial three-month period that you were 6 receiving these four magazines that certain 7 charges appeared on your bank statement? 8 A. After I started receiving the magazines? 9 Q. Yes. We're talking about 2006. 10 A. Yes, I got charges. 11 Q. And when did that happen? 12 A. That happened -- well, the charges were 13 in -- I believe it was September of 2006. 14 Q. And what did you do when you saw those 15 charges? 16 A. I called up my boyfriend, and I started 17 yelling at him. 18 Q. Did you do anything else? 19 A. No. 20 Q. Did you ask your boyfriend whether he 21 wanted to continue receiving the magazines? 22 A. No, because I had no idea of how to 23 unsubscribe from them, because that's what I was 24 trying to do. That's why I found the Spin web 25 site, the ESPN web site, the web sites for Vibe

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<p>1 and Maxim. And I tried to cancel through those 2 web sites, and they were telling me that I had no 3 subscription with them.</p> <p>4 Q. So did you tell your boyfriend that you 5 were going to cancel these magazines?</p> <p>6 A. Yeah, I told him I was going to try to.</p> <p>7 Q. And what steps did you take to try to 8 cancel the magazines?</p> <p>9 A. I went to the web sites of each of the 10 magazines, and I tried to contact their customer 11 service.</p> <p>12 Q. Do you have any record of those 13 contacts? Did you print out anything from the web 14 site?</p> <p>15 A. No, I didn't print anything out.</p> <p>16 Q. Did you make any handwritten notes when 17 you made those contacts?</p> <p>18 A. Well, I know I had send an e-mail to 19 ESPN magazine, but I don't know if that's still in 20 my e-mail account.</p> <p>21 Q. If it is still in your e-mail account, I 22 request that it be produced.</p> <p>23 MR. GREEN: I'm sorry. Do you have a 24 lot more? only because it's getting close to 25 lunch. So if you do --</p>	<p>1 A. No, but I know that, you know, it would 2 have been there because all of his mail is always 3 in the same spot when I get to his house.</p> <p>4 Q. So every single day you go through every 5 piece of mail that he receives?</p> <p>6 A. Yes.</p> <p>7 Q. Do you ever miss a day?</p> <p>8 A. No.</p> <p>9 MS. MAZZUCHETTI: Okay. We can take a 10 break now.</p> <p>11 (There is a recess taken.)</p> <p>12 BY MS. MAZZUCHETTI:</p> <p>13 Q. Ms. Desai, did you speak with anyone 14 other than counsel on your break?</p> <p>15 A. No.</p> <p>16 Q. I'm going to place before you what I 17 previously marked as Defendant's Exhibit 12. 18 Please review that document and let me know when 19 you are finished.</p> <p>20 A. Okay.</p> <p>21 Q. Have you ever seen this document before?</p> <p>22 A. Yes.</p> <p>23 Q. What is it?</p> <p>24 A. It is my bank statement.</p> <p>25 Q. For what time period?</p>
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<p>1 MS. MAZZUCHETTI: If you want to take a 2 break, that's fine. I have a fair amount more.</p> <p>3 MR. GREEN: You have a fair amount? You 4 want to break for lunch?</p> <p>5 MS. MAZZUCHETTI: Just give me two 6 seconds to make sure that I complete this thought.</p> <p>7 MR. GREEN: Sure.</p> <p>8 Q. Other than e-mailing ESPN, did you 9 e-mail any of the other magazines?</p> <p>10 A. No.</p> <p>11 Q. Do you know if -- do you know whether 12 any sort of notice was sent indicating that your 13 account was going to be charged for these 14 magazines in September '06?</p> <p>15 A. No, I received no notice.</p> <p>16 Q. Do you know whether your boyfriend 17 received notice?</p> <p>18 A. No, he did not receive the notice.</p> <p>19 Q. How do you know he didn't receive the 20 notice?</p> <p>21 A. Because I go through all of his mail, 22 and his grandma delivers all of his mail to him 23 when it comes to his house.</p> <p>24 Q. Did you ever ask him whether he received 25 anything?</p>	<p>1 A. For the time period of 9/12/2006 to 2 10/12/2006.</p> <p>3 Q. Is this the bank statement that you told 4 me before that you provided to your counsel in 5 response to the document request?</p> <p>6 A. Yes.</p> <p>7 Q. On the first page of Defendant's Exhibit 8 D-12, your bank statement, do you see there's a 9 listing toward the bottom of the first page that 10 says "other withdrawals and service fees"?</p> <p>11 A. Yes.</p> <p>12 Q. And do you see on the document as a 13 whole there are portions of it blacked out?</p> <p>14 A. Yes.</p> <p>15 Q. Did you do that blacking out?</p> <p>16 A. No.</p> <p>17 Q. Do you know who did?</p> <p>18 A. Well, is it really relevant for you to 19 know what goes through my checking account?</p> <p>20 MR. GREEN: You can answer the question.</p> <p>21 A. My attorneys did.</p> <p>22 Q. Did you direct them to do that?</p> <p>23 MR. GREEN: You know, objection, 24 objection.</p> <p>25 Q. Okay. So looking at the line that says</p>

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1 "other withdrawals and service fees," do you see 2 that? 3 A. Yes. 4 Q. And there are amounts listed. 5 Can you tell me what types of transactions 6 these represent? And by that, I mean: Are these 7 transactions made with a debit card or withdrawals 8 made at the bank? 9 A. Debit cards, and it could be maybe a 10 couple of withdrawals. 11 Q. Any other types of transactions that are 12 represented under this column that -- 13 A. No. Just maybe paying my bills. Using 14 my debit card, there will be a debit transaction. 15 Q. You used online banking to pay some of 16 your bills? 17 A. No. I use my debit card. I don't 18 actually use my online banking itself, except now 19 I use just for -- you know, my one credit card. 20 But I didn't have this credit card at the time, so 21 it wouldn't be on here. 22 Q. And you told me that you have banked 23 with Wachovia since 2004. 24 A. Yes. 25 Q. How many times have you overdrawn your	1 Q. I'm going to ask you to turn to the 2 second page of Exhibit D-12. About halfway down 3 the page do you see that there's a description 4 on -- dated September 18 of 2006 for \$24, and the 5 description is "purchase, TWX"? 6 A. Yes. 7 Q. And do you know what that was for? 8 A. It says right here "ESPN magazine." 9 Q. And do you know what that charge 10 represents with respect to the ESPN magazine? 11 A. That the money is being taken out of my 12 account for a subscription to ESPN magazine. 13 Q. And is it your understanding that that 14 subscription term was for one year? 15 A. Well, that's what I would figure, yes. 16 Q. When did you first become aware of the 17 charge, this particular charge? 18 A. This charge where it says "9/16" next to 19 where it says "ESPN magazine," that's when it 20 first showed up in my online banking. 21 Q. And this is 9/16 of '06? 22 A. Right. And it didn't post until 9/18. 23 Q. Okay. So you're telling me that you 24 first saw it on 19/16/06 on line? 25 A. Yes.
1 Wachovia checking account since 2004? 2 A. Before this I never did. 3 Q. And after it? 4 A. After it I've overdrawn maybe once. 5 Q. When was that? 6 A. I have no idea. 7 Q. Was it within the last year? 8 A. It could have been, yes. 9 Q. And what led to that overdraft that 10 happened in the last year? 11 A. Because I thought that -- well, I may 12 have thought that I had enough in my account. 13 Q. And do you know what type of transaction 14 that you made that led to your account being in 15 the negative? 16 A. No. I mean, for all I know, I could 17 have gotten gas. 18 Q. Okay. And you also told me that you 19 have an account with Washington Mutual? 20 A. Yes. 21 Q. Have you ever overdrawn that account? 22 A. No. 23 Q. Do you know whether your boyfriend has 24 ever overdrawn that account? 25 A. No, because I balance the checkbook.	1 Q. And what did you do when you saw it? 2 A. I was, like, "What is going on here?" 3 And at that point I called my boyfriend, and I 4 was, like, "Why am I getting charged for this?" 5 Q. And what did he say? 6 A. He was, like, "I don't know," because he 7 was under the same impression that I was, that it 8 was just three-months free trial, and that was it. 9 Q. Is that all you talked about with your 10 boyfriend? 11 A. Yes. 12 Q. And then what did you do? 13 A. And then I just went in my online -- or 14 I went in my checkbook, and on 9/16 I took it out 15 of my checkbook. 16 Q. What do you mean, you "took it out" of 17 your checkbook? 18 A. I entered it into my checkbook. 19 Q. Do you have that checkbook register? 20 A. I could. I don't know. I'd have to dig 21 it up between one of my boxes from when I was 22 moving. 23 Q. Did you look for it when you were 24 preparing your responses for the document request 25 that we discussed before?

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1 A. No. I've looked for it maybe a couple 2 of weeks ago, but that was it. 3 Q. I ask that, if you have that, that you, 4 please, produce it. 5 Okay. You told me that you had made efforts, 6 including an e-mail to ESPN, to determine what 7 this charge was. Is that correct? 8 A. Not to determine what the charge was, 9 but to cancel this subscription that apparently 10 was being taken out. 11 Q. And when did you do that? When did you 12 make those efforts that you told me about? 13 A. I did that probably about a couple of 14 days later. 15 Q. And do you see that in this description 16 on your bank statement there is an 800 number, 17 800-927-3807? 18 A. I never saw that at the time. 19 Q. Do you see it now? 20 A. Yeah, I see it now. 21 Q. Did you ever make any attempt to call 22 that number? 23 A. No, because I never saw the number in my 24 online banking. 25 Q. Is this bank statement the same	1 90 days previously, like in that format that I 2 just described. Otherwise, it lets you go into 3 the paper statements into this format. 4 Q. Okay. So after you viewed this charge 5 on September 16, you then at some point received 6 this paper statement in the mail. Is that 7 correct? 8 A. Yeah. 9 Q. And do you review those statements? 10 A. I look them over, yes. I don't 11 completely review them. 12 Q. And you told me previously that you 13 pulled this particular statement off line. Do you 14 know whether this is in the same format that you 15 received in the mail? 16 A. Yeah, this is the same format. 17 Q. Do you know what your checking account 18 balance was on September 16 when that charge 19 appeared? 20 A. I don't know what it is offhand. 21 Q. When that charge first appeared, do you 22 know whether your account was in the positive or 23 the negative? 24 A. It was in the positive. 25 Q. So the \$24 was taken out of -- withdrawn
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1 format -- in the same format that you see on line? 2 A. No. 3 Q. What do you see on line? 4 A. Well, with my online banking itself, it 5 only has the first line, "purchase, TWX, ESPN 6 magazine." 7 Q. Okay. Other than that one change, is 8 the format of your online banking exactly as we 9 see it here? 10 A. No. Online banking is a completely 11 different format than a paper statement. 12 Q. Can you describe to me what that looks 13 like? 14 A. It's got the date, and in the next 15 column it's got the transaction. In the next 16 column it's got, you know, debits, and then the 17 next column it's got credits, and then the next 18 column it has, like, posted balance or actual 19 balance, whatever it is. 20 Q. Like a running balance? 21 A. Yeah. 22 Q. Do you have a copy of the online 23 statement in that format for this time period? 24 A. No, because it doesn't have it on there. 25 It only saves -- with online banking it only saves	1 from your account on 9/16/06, and your account was 2 in the positive? 3 A. Yeah, I mean, as far as I know. Once it 4 actually posted, though -- because it posts on a 5 different day. And once it actually posted, 6 that's what caused my account to go into the 7 negative. 8 Q. Do you know when the money is actually 9 taken out of your account? You're talking about 10 there's a 9/16 date, which is the date that it 11 first appears, and then there's a date of 9/18, 12 which you're saying is the date it posts. 13 Do you know when the money is actually taken 14 out of your account? 15 A. No. 16 Q. Do you know what your checking account 17 balance was as of September 18, 2006? 18 A. No. 19 Q. Would your balance be reflected in the 20 check register that you keep? 21 A. Yes. 22 Q. And do you recall, when you entered the 23 charge for the ESPN in your check register, 24 whether that put your checking account in the 25 negative?

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<p>1 A. Not to Wachovia. I can't do that to 2 Wachovia. 3 Q. Why? 4 A. Because if they say I don't have the 5 funds to do it, then they say I don't have the 6 funds to do it. 7 Q. If the TWX charge was what caused your 8 account to go into overdraft, and you're telling 9 me that it was a credit transaction, why wasn't 10 your card simply rejected? 11 A. Because it was a different kind of 12 credit transaction. It's not like I went to the 13 store, and I went to buy this magazine, and they 14 swiped my card. This is like one of those, like, 15 automatic things that goes through your account, 16 like if you are going to pay a bill, and it's 17 automatically taken out of your account. 18 Q. Ms. Desai, sitting here today, can you 19 tell me which two transactions resulted in the 20 70-dollar overdraft fees charged on 9/18? 21 A. Well, I know for a fact one was the ESPN 22 magazine. 23 Q. But how do you know that for a fact when 24 you don't even know what your balance was on that 25 day?</p>	<p>1 Q. And what caused that overdraft fee? 2 A. Let's see. Probably thinking that I 3 still had money because, you know, this ESPN 4 magazine was just -- shouldn't have been taken 5 out. 6 Q. Well, correct me if I'm wrong, but if 7 you didn't have the \$24 to cover the ESPN 8 magazine, how did you have the 24.14, the 29.90, 9 or the \$25 for those three other purchases you 10 made? 11 A. Because I probably didn't realize that I 12 had overdraft fees. Either that, or, for all I 13 know, I could have also, you know, gotten a, you 14 know, a paycheck in there somewhere, direct 15 deposited, but this statement is not going to show 16 that. 17 Q. Is it possible that your account had a 18 negative balance as a result of the transactions 19 that were unrelated to the ESPN magazine? 20 A. No. 21 Q. Do you know what protocols and 22 procedures Wachovia Bank follows to settle 23 presentations on individual checking accounts on a 24 day-to-day basis? 25 A. No.</p>
<p>1 A. Because I remember what I saw in my 2 online banking. And you know what? I should have 3 done a print screen and saved it. 4 Q. What did you see on your online screen? 5 A. I saw that because this TWX magazine was 6 being taken out, that my account went into 7 overdraft. 8 Q. Do you know whether you would have been 9 overdrawn on your account based on the other 10 transactions, had the ESPN 24-dollar charge not 11 been processed against your account? 12 A. No, I probably wouldn't have had an 13 overdraft fee. 14 Q. Do you know that for a fact, sitting 15 here today? 16 A. I can tell you that, yeah. 17 Q. How can you tell me that? 18 A. Because when I balance my checkbook, I 19 see everything that goes in and out of my bank 20 account. And if I had looked on line and seen 21 this, then I could have actually balanced my 22 account properly. 23 Q. Okay. And then there's another 24 overdraft fee on 9/19. Do you see that? 25 A. Yeah.</p>	<p>1 Q. Do you know whether the transactions -- 2 excuse me -- the transactions listed on this bank 3 statement are actually occurring within the 4 chronological order that they're appearing on a 5 given day? 6 A. It all depends on whether they were 7 debit or credit transactions. That's really what 8 it all comes down to. 9 Q. So the answer is, then -- correct me if 10 I'm wrong -- that you cannot tell from looking at 11 this bank statement the chronological order that 12 these transactions were made? 13 A. I don't know. 14 Q. Do you know whether Wachovia Bank posts 15 credits before debits on a given day? 16 A. That I'm not sure. 17 Q. Do you know whether Wachovia has a 18 policy whereby they will attempt to satisfy a 19 larger presentment over a smaller one in the 20 course of one day's settling of accounts? 21 A. I'm not sure. All I know is that when 22 my paycheck direct deposits, my funds are 23 available for immediate withdrawal. 24 Q. Had you ever been provided with any 25 terms and conditions by Wachovia that describes</p>

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<p>1 no records that I had a subscription with them. 2 Q. Do you know whether you received all of 3 the copies that you were entitled to receive of 4 Vibe, Spin, and Maxim for the one-year renewal 5 period that you were charged for? 6 A. Yes. 7 Q. So they were received? 8 A. Yeah. 9 Q. Do you know whether the renewal amounts 10 charged by Synapse for the one-year's worth of 11 Vibe, Spin, and Maxim are more expensive or less 12 expensive than you would be able to subscribe to 13 those magazines elsewhere? 14 A. I have no idea because normally I don't 15 buy these magazines regularly over the counter. 16 Q. Look at the fourth page of your bank 17 statement, can you tell whether there was any 18 overdraft fee assessed against your account in 19 connection with the charge for Maxim magazine? 20 A. Not that I can see, no. 21 Q. Do you know whether any of these 22 redacted amounts represent an overdraft charge? 23 A. Not that I know of. 24 Q. I'd like to you to look at Exhibit D-2, 25 which is in front of you, the first amended</p>	<p>1 30 as to overdraft charge? 2 A. Well, that's what I had thought, but 3 it's actually more, 35. 4 Q. So did you then adjust your credit -- 5 strike that. 6 Did you then adjust your checkbook register 7 when you learned that you had not been assessed 8 overdraft charges with respect to Vibe, Spin, or 9 Maxim? 10 A. Well, in my online banking it could have 11 said something completely different, which is what 12 I would have recorded into my checkbook. 13 Q. Are you telling me that this bank 14 statement that you provided to me is not accurate? 15 A. It could be, or it could not be. I 16 mean, you know, I wrote this. I went with my 17 checkbook. 18 Q. Okay. So you told me that there came a 19 time in 2007 when you called Synapse to cancel 20 your magazine subscription -- is that correct? 21 A. Yes. 22 Q. -- and that you believe that that call 23 took place somewhere around August 1, 2007. Is 24 that correct? 25 A. Somewhere between late July and early</p>
Page 95	Page 97
<p>1 complaint. Please turn to page 13. 2 Are you on page 13? 3 A. Yes. 4 Q. Do you see paragraph 23 that says, "The 5 following are the factual allegations of plaintiff 6 Desai"? 7 A. Yes. 8 Q. Do you see under paragraph B it reads, 9 "Approximately three months following plaintiff 10 Desai's original order, defendant charged her bank 11 debit card for subscriptions to the four 12 magazines, which resulted in four overdraft 13 charges of \$30 each to her bank account." 14 Do you see that? 15 A. Yes. 16 Q. So this statement is not accurate, is 17 it? 18 A. Well, it was accurate according to my 19 checkbook that I had balanced. 20 Q. According to the checkbook that you had 21 balanced, you're telling me that you had entered 22 four overdraft charges at \$30 per piece each time 23 that you saw there was a charge by TWX? 24 A. Yes. 25 Q. So how did you come up with the number</p>	<p>1 August, yes. 2 Q. Did you talk to anybody about canceling 3 the magazines before you actually went ahead and 4 canceled them? 5 A. No. 6 Q. Do you know whether in 2007 you -- a 7 postcard was sent alerting you to the fact that 8 the magazines were coming up for renewal? 9 A. There was no postcard sent. 10 Q. Do you know whether there was a postcard 11 sent to your boyfriend's grandmother's house? 12 A. I know that there was not one. 13 Q. I just want to make sure that I 14 understand your testimony. 15 You testify that you did not receive a 16 postcard -- 17 A. Right. 18 Q. -- from Synapse? 19 A. Right. 20 Q. But you can't know, sitting here, 21 whether one was actually sent or not? 22 A. Well, I know for a fact. 23 Q. That what? 24 A. That there was no postcard sent. 25 Q. What number did you call when you called</p>

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<p>1 to cancel the magazines?</p> <p>2 A. Whatever number was on ripoffreport.com.</p> <p>3 Q. Do you have that number written down</p> <p>4 somewhere?</p> <p>5 A. No.</p> <p>6 Q. Tell me about the call that you made to</p> <p>7 cancel the magazines.</p> <p>8 A. Oh, it was a major pain, first of all.</p> <p>9 Second of all, I called. And, you know,</p> <p>10 everything was automated, you know. There was no</p> <p>11 way that you could get to a customer service</p> <p>12 person. And even if you tried to, you know, after</p> <p>13 you went through all the options and, you know,</p> <p>14 tried to get you to a customer service rep, you</p> <p>15 know, it said that, you know, the hold was, you</p> <p>16 know, a really long time and that, you know,</p> <p>17 somebody would get to you when they could. And</p> <p>18 basically you'd be on hold for forever, and there</p> <p>19 would be nobody that you could even actually speak</p> <p>20 to, no live person.</p> <p>21 Q. Do you remember how many -- whether the</p> <p>22 prompt said that there was a certain amount of</p> <p>23 minutes that you would have to wait to speak with</p> <p>24 a live person?</p> <p>25 A. I don't remember.</p>	<p>1 Q. How about: How long did it take until</p> <p>2 you were able to get to this point where you were</p> <p>3 able to access your account?</p> <p>4 A. I was probably on the phone for at least</p> <p>5 a half an hour.</p> <p>6 Q. And then what happened after you got to</p> <p>7 your account?</p> <p>8 A. And then I tried to cancel all of the</p> <p>9 magazines together in one step, but it wouldn't</p> <p>10 let me, so then I had to cancel one or cancel, you</p> <p>11 know, one and try and cancel another. And then,</p> <p>12 you know, it just would let me cancel one, and</p> <p>13 then, you know, I tried to go back through all the</p> <p>14 options again, and then it wouldn't let me cancel</p> <p>15 a second one. So then I had to hang up, call</p> <p>16 again, you know, go through all these options</p> <p>17 again, and then basically cancel each magazine</p> <p>18 individually.</p> <p>19 Q. So how many calls altogether did you</p> <p>20 make?</p> <p>21 A. I made about -- well, four to actually</p> <p>22 cancel, and then, you know, to speak to a</p> <p>23 representative I probably called once or twice.</p> <p>24 You know, that was initially when I first called.</p> <p>25 And to cancel, I had to call, you know, back again</p>
Page 99	Page 101
<p>1 Q. What's a "really long time"?</p> <p>2 A. Anywhere that's over five minutes.</p> <p>3 Q. When you first called the number, what</p> <p>4 was the first thing that you heard?</p> <p>5 A. The first thing that I heard -- I don't</p> <p>6 know what the first thing was, but all I know is</p> <p>7 that it gave you options, you know, of either --</p> <p>8 probably either renewing your service or</p> <p>9 canceling. I think it was canceling. And, you</p> <p>10 know, then it told you you could cancel. You</p> <p>11 know, if you provided your bank account number,</p> <p>12 then it could figure out what your magazine</p> <p>13 subscriptions were, and then, you know, you could</p> <p>14 cancel them. You know -- and I was, like, "I am</p> <p>15 not giving my bank account number, nothing," so</p> <p>16 that's why I tried to speak to a customer service</p> <p>17 representative, and I was never able to get</p> <p>18 through to one. So then what I ended up doing</p> <p>19 was -- you know, I kept going in circles with all</p> <p>20 these different prompts, and then finally I was</p> <p>21 able to get to it through -- I believe it was a</p> <p>22 zip code or, you know, something like that.</p> <p>23 Q. So you were able to get to your account?</p> <p>24 A. Yeah, after going in circles about</p> <p>25 50 million times.</p>	<p>1 four times.</p> <p>2 Q. And were you successful in canceling the</p> <p>3 magazines after that call -- those calls?</p> <p>4 A. Yes.</p> <p>5 Q. How long were you on those four calls</p> <p>6 collectively?</p> <p>7 A. Probably about an hour.</p> <p>8 Q. And you testified that you did this</p> <p>9 while you were at work?</p> <p>10 A. Yes.</p> <p>11 Q. Please look at paragraph 23J of</p> <p>12 Exhibit -- Defendant's Exhibit 2. That paragraph</p> <p>13 states, "Plaintiff believes that her responses to</p> <p>14 the options presented by defendant" --</p> <p>15 MR. GREEN: If you could wait one</p> <p>16 second, please.</p> <p>17 MS. MAZZUCHETTI: Page 14, 23J.</p> <p>18 MR. GREEN: Okay. You said "exhibit."</p> <p>19 MS. MAZZUCHETTI: Sorry.</p> <p>20 Q. "Plaintiff believes that her responses</p> <p>21 to the options presented by defendant's automated</p> <p>22 telephone system fully canceled any charges that</p> <p>23 would otherwise follow the 2-dollar-and-1-cent</p> <p>24 temporary authorization charges that appeared on</p> <p>25 her bank account statement, and she received</p>

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<p>1 contained that language or not?</p> <p>2 A. No, I don't know whether it did.</p> <p>3 Q. I would like you to turn to page 35 of</p> <p>4 the complaint, Defendant's Exhibit D-2. I would</p> <p>5 like you to look at paragraph 86 -- are you there?</p> <p>6 A. Yes.</p> <p>7 Q. -- which states, "Plaintiffs and the</p> <p>8 class members have entered into certain contracts</p> <p>9 and agreements with Synapse when they agreed to</p> <p>10 obtain the original subscriptions at a discount."</p> <p>11 Do you see that?</p> <p>12 A. Uh-huh, yes.</p> <p>13 Q. What contract do you claim that you</p> <p>14 entered into with Synapse Group?</p> <p>15 A. Them taking money out of my bank</p> <p>16 account.</p> <p>17 Q. What was the contract? What was the</p> <p>18 agreement?</p> <p>19 A. I can't answer that.</p> <p>20 Q. Why not?</p> <p>21 A. Because I can't recall.</p> <p>22 Q. Is it your testimony that there was an</p> <p>23 agreement between you and Synapse?</p> <p>24 A. All I know -- for all I know, the</p> <p>25 agreement could have been, you know, just you get</p>	<p>1 going to take money out of my account that I never</p> <p>2 agreed to ...</p> <p>3 Q. But that's not what I'm asking you. I'm</p> <p>4 asking: How did you satisfy your obligations?</p> <p>5 A. Well, then --</p> <p>6 MR. GREEN: There's no question posed.</p> <p>7 Q. I'm asking you what you did to satisfy</p> <p>8 your obligations.</p> <p>9 MR. GREEN: I think that was asked and</p> <p>10 answered already.</p> <p>11 MS. MAZZUCHETTI: I don't know if I got</p> <p>12 an answer.</p> <p>13 MR. GREEN: Your answer was that -- if</p> <p>14 you could, read back what her answer was.</p> <p>15 (Counsel requests the reading of the</p> <p>16 following testimony:</p> <p>17 "ANSWER: As far as I know, I had no</p> <p>18 obligations.")</p> <p>19 MR. GREEN: Yes. Thank you.</p> <p>20 Q. Can you look at the first page of the</p> <p>21 complaint, Defendant's Exhibit D-2?</p> <p>22 Do you see on the caption where your name is</p> <p>23 listed in addition to six other names?</p> <p>24 A. Yes.</p> <p>25 Q. Do you know any of the other people that</p>
Page 107	Page 109
<p>1 these magazines for ...</p> <p>2 Q. What does that mean in your complaint?</p> <p>3 You say that you entered into a contract with</p> <p>4 Synapse. What does that mean?</p> <p>5 A. Well, like I was saying, for all I know,</p> <p>6 it could mean you're going to get, you know, free</p> <p>7 trial issues, and that's it.</p> <p>8 Q. Okay. And do you see -- moving down to</p> <p>9 page -- I'm sorry -- paragraph 87, you allege that</p> <p>10 Synapse Group breached its contract with you.</p> <p>11 What did Synapse do to breach its contract</p> <p>12 with you?</p> <p>13 A. They charged me for these magazines that</p> <p>14 I wasn't supposed to be charged for.</p> <p>15 Q. Was this contract in writing?</p> <p>16 A. I got nothing in writing.</p> <p>17 Q. In paragraph 88 you allege that</p> <p>18 "Plaintiff and the class members satisfied their</p> <p>19 obligations under these contracts and agreements."</p> <p>20 What did you do to satisfy -- what were your</p> <p>21 obligations under the contract?</p> <p>22 A. As far as I know, I had no obligations.</p> <p>23 Q. Why does it say here that you satisfied</p> <p>24 your obligations?</p> <p>25 A. Well, according to them, if they were</p>	<p>1 are named in the caption?</p> <p>2 A. No, I do not.</p> <p>3 Q. Have you ever spoken with any of them?</p> <p>4 A. No.</p> <p>5 Q. Do you have an understanding of what</p> <p>6 their claims are in this case?</p> <p>7 A. From what I've read.</p> <p>8 Q. What is your understanding?</p> <p>9 A. That they went through the same thing</p> <p>10 that I did.</p> <p>11 Q. And what have you read?</p> <p>12 MR. GREEN: Go ahead. You can answer</p> <p>13 the question.</p> <p>14 A. Basically that everyone else, like me,</p> <p>15 was ripped off by Synapse Group.</p> <p>16 Q. I was asking you what document you read.</p> <p>17 A. I read this amended document.</p> <p>18 Q. The complaint?</p> <p>19 A. Yes.</p> <p>20 Q. When did you agree to become a plaintiff</p> <p>21 in this case?</p> <p>22 A. I do not recall the exact date.</p> <p>23 MR. GREEN: I think that was already</p> <p>24 dealt with as well, you know --</p> <p>25 THE WITNESS: Yeah.</p>

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<p>1 MR. GREEN: I've given you a lot of 2 leeway here, but you've asked a lot of questions 3 repetitively, and I would hope we're coming to the 4 end of this.</p> <p>5 MS. MAZZUCHETTI: I don't agree with 6 that.</p> <p>7 Q. Did you sign an agreement with any of 8 the lawyers in this case agreeing that they would 9 represent you in this matter?</p> <p>10 A. I signed a retainer agreement.</p> <p>11 Q. With whom?</p> <p>12 A. With Mr. Diamond and Mr. Green and 13 Mr. --</p> <p>14 Q. Graysen?</p> <p>15 A. Yes.</p> <p>16 Q. What was the date of that agreement?</p> <p>17 A. I don't remember the exact date.</p> <p>18 Q. Can you estimate when you signed it?</p> <p>19 A. I have no clue.</p> <p>20 Q. Do you know whether it was before or 21 after August 1, 2007?</p> <p>22 A. It was -- I know it was after I canceled 23 these magazine subscriptions.</p> <p>24 Q. Do you know it was before or after the 25 date that this complaint was filed with the Court?</p>	<p>1 the call?</p> <p>2 A. All I wrote down was my confirmation 3 numbers.</p> <p>4 Q. Do you have that note?</p> <p>5 A. I don't think so.</p> <p>6 Q. If you do, I request that it be 7 produced.</p> <p>8 Did anyone give you advice as to how you 9 should handle the call with Synapse?</p> <p>10 A. No.</p> <p>11 Q. Have you filed any other complaints or 12 grievances against Synapse other than the 13 complaint that was filed in this lawsuit?</p> <p>14 A. No.</p> <p>15 Q. Have you ever filed a complaint against 16 any company with the Better Business Bureau?</p> <p>17 A. No.</p> <p>18 Q. Have you ever filed a complaint against 19 any company with any state agency?</p> <p>20 A. No.</p> <p>21 Q. Have you ever filed a complaint against 22 any company with any Federal agency?</p> <p>23 A. No.</p> <p>24 Q. Have you ever heard of a "blog"?</p> <p>25 A. A what?</p>
Page 111	Page 113
<p>1 A. I don't know, but, you know, it had to 2 have been.</p> <p>3 Q. And have you been promised anything in 4 return for being a class representative in this 5 case?</p> <p>6 A. No, just, you know, whatever my own 7 emotions and feelings are, that -- you know, I 8 just want this company to, you know, be stopped 9 and for them to, you know, just go away, I guess 10 you could say.</p> <p>11 Q. Do you plan on ordering any magazines -- 12 any more magazines from Synapse?</p> <p>13 A. No, never.</p> <p>14 Q. And you're not their customer now.</p> <p>15 Right?</p> <p>16 A. Not anymore, no.</p> <p>17 Q. When you called Synapse to cancel your 18 magazines during the four or five calls that you 19 told me about, was there anyone else on the call 20 with you?</p> <p>21 A. No.</p> <p>22 Q. Did you make any type of recording of 23 the call?</p> <p>24 A. No.</p> <p>25 Q. Did you take any notes while you were on</p>	<p>1 Q. A blog.</p> <p>2 A. Like an internet blog?</p> <p>3 Q. Yes.</p> <p>4 A. I've heard of it, yes.</p> <p>5 Q. Have you ever visited any consumer 6 advocacy blog -- I don't know if ripoff.com is a 7 blog -- but other than ripoff.com, we'll say.</p> <p>8 A. No.</p> <p>9 Q. Have you ever posted a message to or 10 written a blog about Synapse?</p> <p>11 A. No.</p> <p>12 Q. Have you ever heard the phrase "negative 13 option"?</p> <p>14 A. No.</p> <p>15 Q. Do you have any understanding of what 16 your responsibilities are as a potential class 17 representative?</p> <p>18 A. Yes.</p> <p>19 Q. What are your responsibilities?</p> <p>20 A. Basically to take this company down, and 21 also to help others from being ripped off by this 22 company. There's millions of people out there who 23 are going through the same thing, and they 24 shouldn't be going through it.</p> <p>25 Q. Any other obligations?</p>

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1 A. No.
2 MS. MAZZUCHETTI: Could we just take a
3 break?
4 MR. GREEN: Sure.
5 (There is a recess taken.)
6 BY MS. MAZZUCHETTI:
7 Q. Ms. Desai, did you talk to anyone other
8 than counsel during the break?
9 A. No.
10 Q. Can I have the correct spelling of your
11 fiance's name?
12 A. Sure. It's H-e-l-l-r-i-e-g-e-l.
13 Q. And his first name is Keith?
14 A. Yes.
15 Q. And what Wachovia Banks do you -- what
16 branch do you bank at?
17 A. There is actually two. One is in
18 Hackettstown, and actually that's my -- the main
19 one, the second one is in Mansfield.
20 MS. MAZZUCHETTI: Okay. That's all I
21 have. Thank you very much.
22 (Time noted: 1:39 p.m.)
23
24
25

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1
2 CERTIFICATE
3
4
5 I, MARK IUZZOLINO, a Certified Shorthand
6 Reporter and Notary Public of the State of New
7 Jersey certify that the foregoing is a true and
8 accurate transcript of the testimony of the
9 aforementioned first duly sworn by me.
10 I further certify that I am neither
11 attorney or counsel for, nor related to or
12 employed by, any of the parties to the action in
13 which the deposition is taken, and further that I
14 am not a relative or employee of any attorney or
15 counsel employed in this case, nor am I
16 financially interested in the action.
17
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19
20
21
22
23
24
25

CERTIFIED SHORTHAND REPORTER
NOTARY PUBLIC OF NEW JERSEY
LICENSE NO. X101103

Gilbertsen Exhibit G

4 -----X
CHARLES T. MCNAIR, THEODORE AUSTIN,
5 DANIELLE DEMETRIOU, STEVEN NOVAK, ROD BARE,
USHMA DESAI and JULIE DYNKO on behalf of
6 themselves and all others similarly
situated.

9 SYNAPSE GROUP, INC.

11 Defendant.

12

13 DEPOSITION OF JULIE DYNKO

14 Saturday, April 5, 2008

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1 (Documents are marked as Defendant's
2 Exhibit Dynko 13 and 14 for Identification.)

3

9 DIRECT EXAMINATION

10 BY MR. CASTELLO:

11 Q Good morning, Ms. Dynko, my name is Geoff
12 Castello, I represent the Defendant Synapse Group,
13 Inc. in this case, and you are here for your
14 deposition this morning. So, what I would like to
15 do is just spend a couple of minutes and go over the
16 ground rules so that you could have an idea of
17 what's going to happen here today. Have you ever
18 had your deposition taken before?

22 Q When you say we, who do you mean?

23 A The other person that was suing my company
24 was there present, as well.

25 Q Were you defending in that action?

J. Dynko - Direct

18

1 Q Have you spoken to Mr. Green prior to
2 today?

3 A Yes.

4 Q Have you spoken to Mr. Diamond prior to
5 today?

6 A I believe he was on the conference call
7 that we just had this week.

8 Q You had a conference call this week?

9 A About today, to make sure I was coming and
10 I had everything set.

11 Q When was the first time that you spoke
12 with any attorneys about the possibility of you
13 becoming a party to this action?

14 A I believe it would have been July of 2007,
15 and it was the original person that saw, like I
16 said, the entry that I made on the -- I hope I am
17 saying this right, RipOff.com, I believe it was.

18 MR. GRAIFMAN: I would just object to
19 the extent anticipating any questions as to the
20 conversation substance.

21 Q Yeah, I think I made it clear, but I want
22 to be certain that when I am asking you questions
23 about discussions with attorneys, I am not asking
24 you to tell me about the substance of your
25 communications. I'm really asking for dates, and we

J. Dynko - Direct

19

1 will give Mr. Graifman an opportunity to object to
2 any of my questions, but I want you to know that I
3 am not asking you to tell me about the discussions
4 you had with them, okay?

5 A Yes.

6 Q But I am interested in knowing when you
7 first spoke to them. So, we will go back again.
8 How did you first hear about this lawsuit?

9 A I received an e-mail in July.

10 Q Who did you receive an e-mail from?

11 A I believe it was Mr. Duffy.

12 Q And who is Mr. Duffy?

13 A I believe he is another attorney on the
14 case.

15 Q Do you know how it came that you received
16 an e-mail from an attorney?

17 A He mentioned in his e-mail that he read my
18 entry on RipOff.com.

19 Q Is your entry on RipOff.com a part of a
20 comment section?

21 A Yes.

22 Q What did you say in your comment section
23 in RipOff.com?

24 A Basically, did anyone know how to get
25 ahold of a live person, I was having difficulty

J. Dynko - Direct

21

1 representative, I mean somebody who you are quite
2 certain is living and breathing at the time that you
3 are talking to them, as opposed to maybe a voice
4 recognition system that asks you to answer questions
5 with a yes or no. You understand that?

6 A Yes.

7 MR. GRAIFMAN: Assuming she could
8 guess they are living and breathing.

9 Q We are going to make the assumption they
10 are living and breathing. I am not going to make a
11 representation that they are. But I am quite
12 serious about this. I want to make sure that we've
13 got this distinction. So, now I want to ask this
14 question again. Prior to or up through today, do
15 you know if you've ever spoken to a live human being
16 at Synapse about any magazine subscription that
17 you've had at any time?

18 A I don't believe I ever spoke to a live
19 person. I was given offers that I believe was an
20 automated response. I never spoke, to the best of
21 my recollection, and we have to realize this has
22 been going on since 2002. It's 2008. I have three
23 children, and one of whom has been in and out of the
24 hospital, so I've had many other issues that were
25 more important than the magazine issue. I don't

J. Dynko - Direct

27

1 this action, did you read the complaint that was
2 initially filed?

3 A I believe so.

4 Q What do you recall about that complaint?

5 A The complaint against Synapse?

6 Q Yes.

7 A Basically, that some people receive
8 postcards, some people don't feel they did, that the
9 postcards were confusing, that people were unable to
10 cancel their magazines in a reasonable fashion. I
11 believe that's about all that I remember
12 specifically seeing.

13 Q Prior to the time that you were contacted
14 by Mr. Duffy, though, you did receive a postcard, is
15 that correct?

16 A Yes.

17 Q On more than one occasion?

18 A I can't be sure.

19 Q Have you ever made any, other than this
20 action, have you ever made any other type of
21 consumer complaints to any company?

22 MR. GRAIFMAN: I am going to object
23 to the term complaints. Do you mean like a
24 complaint as we filed here, or just called up
25 and complained that the serviceman didn't show

J. Dynko - Direct

34

1 that recording, I could actually listen to when it's
2 proposed that I ordered and canceled several
3 magazines, and I did listen to those.

4 Q Do you know if you received Family Circle
5 in the year 2000?

6 A I couldn't be sure.

7 Q Do you know if you received Family Circle
8 in the year 2001?

9 A I wouldn't be able to be sure.

10 Q How about 2002?

11 A I can't be sure.

12 Q How did 2003?

13 A I don't know.

14 Q How did 2004?

15 A I don't recall.

16 Q How about 2005?

17 A I don't recall.

18 Q Do you ever recall receiving any
19 postcards, with respect to Family Circle Magazine?

20 A Postcards, yes. Family Circle, I can't be
21 sure.

22 Q Do you recall ever dialing any toll free
23 numbers in connection with your subscription to
24 Family Circle?

25 A I can't be sure which specific magazines I

J. Dynko - Direct

41

1 document that is in the group of documents marked as
2 D-15, and it has an address or it's addressed to
3 Julie Silver at Two Eva Drive, in Peru, New York.
4 Do you see that?

5 A Yes, I do.

6 Q And then if you look at the next page,
7 okay, it's also a part of that same document. Have
8 you ever seen a document like that?

9 A I have seen one for Skateboarding.

10 Q So, if I refer to the postcard today, I am
11 going to be referring to that document.

12 A I've seen postcards like this for
13 Skateboarding and Preschool Playroom.

14 Q Have you ever seen a postcard like that
15 for Consumer Reports?

16 A Not that I recall.

17 Q Have you ever seen a postcard like that
18 for Family Circle?

19 A Not that I recall.

20 Q Have you seen a postcard like that for
21 Sesame Street?

22 A Not that I remember.

23 Q Have you ever seen a postcard like that
24 for Family Money?

25 A I don't even know that magazine exists,

J. Dynko - Direct

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1 Q How did you know what number to call?

2 A I believe that's one of the ones I
3 received a postcard for, but it could be that I
4 called an 800 number on the Discover Card statement,
5 but I know I received a postcard for Preschool
6 Playroom. I cannot be certain what year. I do
7 believe that I called because, as a result of a
8 postcard for that particular magazine.

9 Q Have you ever heard of a website called
10 Magazine Outlet or MagOutlet.com?

11 A I don't remember them.

12 Q Have you ever ordered a magazine entitled
13 Electronic Gaming?

14 A I believe it could have been ordered. I
15 don't recall ordering it. It could have been my
16 husband. I have a teenage son and I have a younger
17 son who do use electronic equipment, Game Boys,
18 Nintendos, et cetera.

19 Q Has your husband ever ordered any
20 magazines under your name?

21 A I don't think he ever would. He doesn't
22 like to order any magazines.

23 Q Do you know if you ever ordered Preschool
24 Playroom through MagOutlet.com?

25 A I don't recall.

J. Dynko - Direct

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1 Q Do you recall receiving a postcard with
2 respect to Rolling Stone Magazine?

3 A I believe I might have.

4 Q Do you recall whether you called any toll
5 free numbers that were on that postcard?

6 A I believe that's one of the ones I tried.
7 I am not sure if that's the one I was successful or
8 if Discover Card was successful. I got a partial
9 credit, I believe, on that particular magazine.

10 Q Do you recall calling the toll free number
11 to cancel Rolling Stone Magazine?

12 A Yes.

13 Q Do you recall receiving a postcard for
14 Newsweek Magazine?

15 A I may have. I believe I did, and called
16 the number. But, again, I can't be clear which ones
17 I -- I can't be certain which ones I called because
18 of the number on the Discover Card statement, versus
19 the ones I received a postcard. I only recall
20 receiving postcards for the last couple of years.
21 Never in the year 2000, 2001, 2, the earlier years
22 you spoke to.

23 Q The postcards that you did receive, they
24 had toll free numbers on them, is that right?

25 A Yes, and a date to call by.

J. Dynko - Direct

57

1 Q And when you received those postcards, did
2 you know what information that postcard was
3 communicating to you?

4 A I did after 2005. In the beginning it
5 looked like, it says moving, with a little band, and
6 I wasn't certain about that, but if you open it up,
7 it does state: If you would like to continue
8 receiving, do nothing or something -- I'm
9 paraphrasing -- but if you would like to cancel,
10 call this number by this date. And anytime I did
11 those and called those, I was not successful in
12 doing so, that I recall.

13 Q But you were successful in calling the
14 number?

15 A I could call the number, yes.

16 Q And the postcard gave you the information
17 that you needed?

18 A Yep, and a date, yes.

19 Q And you understood that information on the
20 postcard?

21 A I understood that clearly.

22 Q It was clear to you?

23 A It was clear that I needed to call by a
24 specific date to get a full refund, but the outside
25 of the postcard was not, at all, clear. It did not

1 say FYE or Newsweek or Rolling Stone. I don't
2 even -- well, I could tell by looking now that it
3 says Synapse Connect, apparently. And it folds in
4 such a manner that you are, it looks like it's a --
5 well, I've received them from the Post Office saying
6 if you are moving, let us know so we could change
7 all of your stuff. It does not look like it is in
8 any means going to be anything about anything I need
9 to open for any reason. It just says: Are you
10 moving? No? Okay.

11 Q But you did open them, right?

12 A I did in -- I recall opening them in 2005.
13 I received one, I opened it up, I saw I needed to
14 call. That's how I started getting information
15 about Preschool Playroom.

16 Q And when you opened it up, when you opened
17 that postcard up, it had information specific to
18 you, is that right?

19 A About your subscription, yes.

20 Q And it lists titles of magazines that you
21 are receiving, is that right?

22 A Yes.

23 Q That is personal information to you, is
24 that right?

25 A Yes.

J. Dynko - Direct

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1 A I am not certain.

2 Q Did you ever call Synapse's automated
3 telephone system in December of 2004 to cancel a
4 subscription to Preschool Playroom?

5 A I don't recall December 2004, no.

6 December is a busy month.

7 Q Sitting here today, can you tell me
8 whether you ever canceled a subscription to
9 Electronic Gaming with a live customer service
10 representative from Synapse in September of 2005?

11 A I don't recall ever speaking to a live
12 person at Synapse, so I would say no.

13 Q Sitting here today, can you tell me if you
14 recall ever canceling a subscription to Preschool
15 Playroom with a live customer service representative
16 at Synapse in September of 2005?

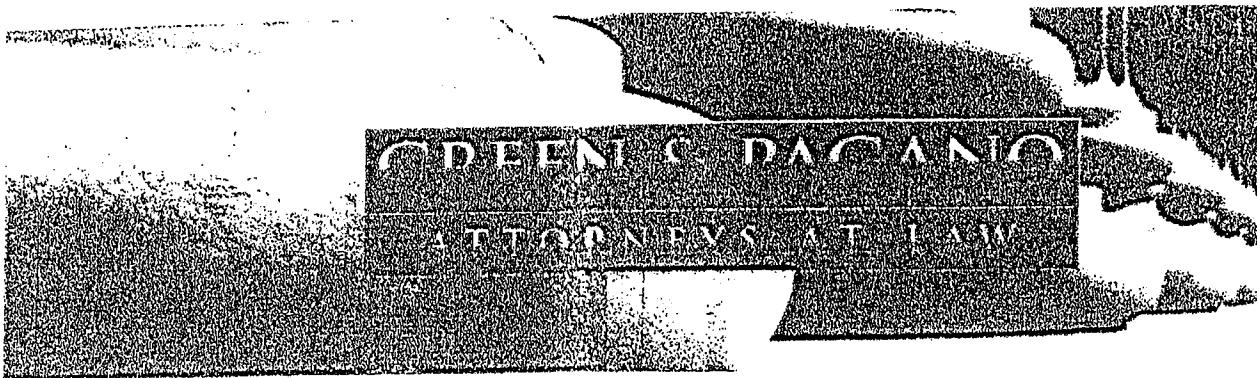
17 A Not a live person, no. I did cancel in
18 2005, but not with a live person, and I believe I
19 got help from Discover Card on that one.

20 Q Sitting here today, can you tell me if you
21 recall ever canceling a subscription to Budget
22 Living, by speaking with a live customer service
23 representative at Synapse in September of 2005?

24 MR. GRAIFMAN: Objection.

25 A No.

Gilbertsen Exhibit H



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Attorney Profiles

Michael Green
Alex Pagano
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GREEN & PAGANO, LLP

Milltown Office
86 Washington Avenue
Milltown, NJ 08850
Phone: 732-300-0480
Fax: 732-390-0481
(Directions)

The Florham Park Office
50 Vreeland Road
Bldg. A, Suite 230A
Florham Park, NJ 07932
Phone: 973-301-2208
Fax: 973-301-2277
(Directions)

MagAbuse.com

**CONSUMER INVESTIGATION WEBSITE:
MAGAZINE SUBSCRIPTION ABUSE**

Welcome to Green & Pagano, LLP's website. We are currently investigating reports of consumer abuse by magazine subscription services.

**HAVE YOU EXPERIENCED ANY OF THESE PROBLEMS
WITH A MAGAZINE SUBSCRIPTION SERVICE?**



- Signed up for a special magazine subscription offer, but then been unable to cancel an automatic renewal of the subscription?
- Experienced difficulty in ending the automatic renewal of your subscription?
- Thought that you canceled your magazine subscription only to find that a charge keeps appearing on your credit card bill?
- Been misled as to the terms of a magazine subscription and/or its renewal?

If you have experienced any form of consumer abuse by a magazine subscription service
HAVE LEGAL RIGHTS AND REMEDIES.

Please take a few minutes to fill out our reporting form below.

* First name: [REDACTED]

* Last name: [REDACTED]

* Address: [REDACTED]

* City: [REDACTED]

* State: [REDACTED]

* Zip: [REDACTED]

Day phone: [REDACTED]

Evening phone: [REDACTED]

Fax: [REDACTED]

* Email: [REDACTED]

Preferred method of contact: [REDACTED]

Best time to contact you: [REDACTED]

How did you hear about us? [REDACTED]

Publishing / Subscription Service [REDACTED]

Name: [REDACTED]

(You may have received a card in the mail that has the name – if you don't have the card, please provide the name and telephone number that appears in connection with the charge on your credit or debit card.)

Magazine(s) that you are having [REDACTED]
difficulty with: [REDACTED]

In what year did your problems [REDACTED]
start?: [REDACTED]

When did you last experience this [REDACTED]
problem?: [REDACTED]

(for example, when did you last get charged for a renewal that you thought you had canceled.)

What kind of problems have you [REDACTED] I tried but was unable to cancel renewals of the
had? [REDACTED] subscription.

(Please check as many as apply)

[REDACTED] I received a card in the mail having a telephone
call to cancel renewal of the magazine subscription

[REDACTED] I was confused or misled by the automated sub
cancellation system that I called, resulting in non-c

[REDACTED] Even though I canceled the subscription, the cl

renewal kept appearing on my credit card bill or debt statement.

[REDACTED] thought I did everything correctly to cancel the subscription, but I was charged for the renewal

[REDACTED] I had to call the automated cancellation system times to get the renewal cancelled.

Where did you receive the original
special offer to subscribe to the
magazine (particular website, mail,
magazine / please specify):
[REDACTED]

Please tell us more about the
problem(s) you experienced:
[REDACTED]

* Items in red = required fields

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